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NOTES AND COMMENTS

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Volume 20 Fall 1995 Number 1

TABLE OF CONTENTS

SURVEYS OF FLORIDA LAW

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NOTES AND COMMENTS

Appellate Practice: 1995 Survey of Florida Law

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TABLE OF CONTENTS

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I. INTRODUCTION

This article will discuss recent developments in the field of appellate practice in Florida. Although the article is focused primarily on cases decided between July 1, 1994, and June 30, 1995, it will also deal with certain cases decided shortly before and after that period which are either of particular interest to the appellate practitioner or which provide the background for, or the culmination of, issues that were addressed by cases decided during that period.

In a broad sense, every appellate decision falls within the scope of appellate practice. Decisions relating to substantive areas of the law, however, are more properly dealt with in articles relating to those substantive areas and therefore will not be discussed here. Rather, this article will focus on matters relating to practice in the appellate courts and will deal with substantive areas only with regard to appellate considerations unique to those areas. Additionally, this article will not discuss cases relating to the preservation of issues, nor the question of whether particular errors were harmless.

II. AMENDMENTS TO THE *FLORIDA RULES OF APPELLATE PROCEDURE*

The Supreme Court of Florida adopted three amendments to the *Florida Rules of Appellate Procedure*. Two of those amendments will be discussed in this section of this article, while the third will be discussed in section III (B), *infra*.[1]

A. *Rule 9.600: Jurisdiction of Lower Tribunal Pending Review*

The court amended rule 9.600(c) to provide that when an appeal is taken in a dissolution of marriage action, the lower tribunal shall retain jurisdiction to enter and enforce orders awarding *"temporary attorneys' fees and costs reasonably necessary to prosecute or defend an appeal."*[2] The 1994 Committee Note indicates that the rule was amended "to conform to and implement section 61.16(1), *Florida Statutes* (1994 Supp.), authorizing the lower tribunal to award temporary appellate attorneys' fees, suit money,

1. The amendment not discussed here arose from the fact that the First District Court of Appeal has split into two autonomous divisions of court. That split is discussed in section III (A) of this article. Discussion of the amendment, which currently impacts only on the First District, has thus been deferred until after discussion of the split.

2. Amendments to Florida Rules of Appellate Procedure 9.140 and 9.600, 657 So. 2d 897, 898 (Fla. 1995).

and costs."[3] The amendment also makes some changes in the wording of the rule with regard to attorney's fees and costs for services rendered in the lower tribunal, but it continues to allow the lower tribunal to retain jurisdiction to enter and enforce orders relating to such matters, as well as "orders awarding separate maintenance, child support, alimony . . . or other awards necessary to protect the welfare and rights of any party pending appeal."[4]

B. *Rule 9.800: Uniform Citation System*

Rule 9.800(n) was amended to include a sentence that states: "When referring to specific material within a Florida court's opinion, pinpoint citation to the page of the Southern Reporter where that material occurs is optional, although preferred."[5] This amendment is the result of problems that have arisen from the increasing use of electronic databases that do not utilize the page numbering system employed by the West Publishing Company in the *Southern Reporter*.[6]

III. COURT DIVISIONS

A. *The First District*

In *In re Court Divisions*,[7] the First District Court of Appeal[8] became the first Florida district court to create two autonomous divisions of court. The Administrative Division, to which five judges were initially assigned,[9] will consider administrative appeals arising under specifically enumerated provisions of the *Florida Statutes*,[10] and original proceedings arising out

3. *Id.* at 898 app. A (citing the 1994 committee note to FLA. R. APP. P. 9.600).

4. FLA. R. APP. P. 9.600(c).

5. *In re* Florida Rule of Appellate Procedure 9.800(n), 20 Fla. L. Weekly S524 (October 12, 1995).

6. It is interesting to note that the amendment refers only to "material within a Florida court's opinion." *Id.* Presumably, the use of such limiting language means that the rule does require specific page citations to West, or other official, reporters when references are made to material within opinions of courts from other jurisdictions.

7. 648 So. 2d 761 (Fla. 1st Dist. Ct. App. 1994).

8. Florida's district courts of appeal will hereinafter be referred to as the First District, the Second District, the Third District, the Fourth District and the Fifth District.

9. *In re* Assignment of Judges to Divisions, 648 So. 2d 764, 764 (Fla. 1st Dist. Ct. App. 1994).

10. The specific provisions are set forth in *Court Divisions*, 648 So. 2d at 761-62.

of or involving proceedings under those provisions.[11] The General Division, to which the court's other ten judges were assigned,[12] will consider all matters not assigned to the Administrative Division.[13]

B. *En Banc Determination*

Subsequent to the division of the First District, the supreme court amended Florida Rule of Appellate Procedure 9.331 by creating a new subparagraph (b).[14] The new provision states that if a district court chooses to sit in subject matter divisions, "en banc determinations shall be limited to those regular active judges within the division to which the case is assigned, unless the chief judge determines that the case involves matters of general application and that en banc determination should be made by all regular active judges."[15] It goes on to provide that "in the absence of such a determination by the chief judge, the full court may determine by an affirmative vote of three-fifths of the active judges that the case involves matters that should be heard and decided by the full court . . . ."[16]

The supreme court adopted this rule amendment by a 4-3 vote.[17] In a dissenting opinion, in which Justices Shaw and Kogan concurred, Justice Anstead pointed out that three judges in a five-judge division of a fifteen-judge court[18] will have the authority to control an en banc decision.[19] Justice Anstead further stated that since three judges will be able to overturn a prior decision, and since the chances of overturning a decision will be increased as judges regularly rotate into and out of the five-judge division, "the consistency and stability provided by the required participation of the entire court will be lost."[20]

Justice Overton, in a specially concurring opinion with which Chief Justice Grimes concurred, responded to the dissenters' concerns. He stated,

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11. *Id.* at 762.

12. *Assignment of Judges*, 648 So. 2d at 764.

13. *Court Divisions*, 648 So. 2d at 761.

14. *In re* Amendment to Florida Rule of Appellate Procedure 9.331(b), 646 So. 2d 730 (Fla. 1994).

15. *Id.* at 731.

16. *Id.*

17. *Id.* at 730.

18. Although not specifically noted by Justice Anstead, the numbers to which he refers reflect the size of the First District as a whole and of its Administrative Division. *Assignment of Judges*, 648 So. 2d at 764.

19. *Amendment to Florida Rule of Appellate Procedure 9.331(b)*, 646 So. 2d at 731 (Anstead, J., dissenting).

20. *Id.*

"I disagree with the anticipated horribles of the dissent. We need to allow new ideas an opportunity to be tested to see if they will work in a way that will improve efficiency and consistency in the appellate decision-making process."[21]

C. *Appellate Division of the Circuit Court*

In *Melkonian v. Goldman*,[22] the petitioner sought certiorari review, in the Circuit Court in and for the Eleventh Judicial Circuit, of an administrative decision to suspend his driver's license.[23] An individual judge denied the petition, concluding that it failed to demonstrate a prima facie case.[24] The Third District granted certiorari and quashed the order, finding that the failure to assign the case to a three-judge panel, and the delegation instead to an individual judge, of the task of deciding the petition on its merits, constituted a departure from the essential requirements of law.[25]

The Third District pointed out that the supreme court promulgated a local rule for the Eleventh Judicial Circuit that establishes an Appellate Division of that court.[26] That rule provides that certiorari petitions are to be heard on their merits by three-judge panels of the Appellate Division.[27] Through a memorandum, however, the administrative judge of the Appellate Division implemented a procedure by which individual judges rule on the motions.[28] The memorandum provided for petitions for writs of certiorari to be assigned to an individual judge for determination of "'whether a Prima Facie case has been raised requiring a panel's review.'"[29]

The Third District found the portion of the administrative order that allowed an individual judge to rule on the merits of a petition for writ of certiorari to be inconsistent with the local rule and therefore void.[30] The court relied on Florida Rule of Judicial Administration 2.020(c), which indicates that administrative orders must not be inconsistent with "'court rules and administrative orders entered by the supreme court.'"[31] The court

21. *Id.* at 730 (Overton, J., concurring specially).
22. 647 So. 2d 1008 (Fla. 3d Dist. Ct. App. 1994).
23. *Id.* at 1009.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Melkonian*, 647 So. 2d at 1009.
28. *Id.*
29. *Id.*
30. *Id.* at 1009-10.
31. *Id.* at 1009 (emphasis omitted).

did indicate, however, that its opinion should not be read to invalidate the remaining portions of the administrative order.[32]

IV. JURISDICTION

A. *Jurisdiction on Discretionary Review*

In both *Gee v. Seidman & Seidman*[33] and *Salgat v. State*,[34] the supreme court declined to reach the merits of the case because the district courts certified to be of great public importance questions upon which they did not first pass.[35] The court noted in *Gee* that under article V, section 3(b)(4) of the *Florida Constitution*, the court only "has jurisdiction to review 'any decision of a district court on appeal that *passes upon* a question certified by it to be of great public importance.'"[36]

B. *Jurisdiction When a Notice of Voluntary Dismissal Is Filed*

In *State v. Schopp*,[37] the supreme court addressed a respondent's claim that the court lacked jurisdiction because the respondent had filed a notice of voluntary dismissal in the district court prior to the final disposition of his appeal.[38] After the district court's decision was issued, the respondent, Schopp, who was the appellant in the district court, timely filed a motion for rehearing.[39] Before the district court ruled on that motion, the State, the appellee in the district court, timely sought review in the supreme court.[40] While the motion for rehearing was still pending, Schopp filed a notice of voluntary dismissal pursuant to Florida Rule of Appellate Procedure 9.350(b).[41]

The State moved to strike the notice.[42] Schopp then sought a writ of mandamus from the supreme court to compel the district court to dismiss the appeal. The district court granted the motion to strike and denied the

32. *Melkonian*, 647 So. 2d at 1010 n.2.
33. 653 So. 2d 384 (Fla. 1995).
34. 652 So. 2d 815 (Fla. 1995).
35. *Gee*, 653 So. 2d at 385; *Salgat*, 652 So. 2d at 815.
36. *Gee*, 653 So. 2d at 385 (quoting FLA. CONST. art. V, § 3(b)(4)).
37. 653 So. 2d 1016 (Fla. 1995).
38. *Id.* at 1018.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Schopp*, 653 So. 2d at 1018.

motion for rehearing.[43] Schopp then moved to dismiss the supreme court proceeding, alleging that he had a right to have the district court proceeding dismissed and that the supreme court therefore lacked subject matter jurisdiction.[44]

The supreme court rejected Schopp's claim, stating that "[e]ven where a notice of voluntary dismissal is timely filed, a reviewing court has discretion to retain jurisdiction and proceed with the appeal."[45] The court noted that it is particularly true that the court retains such discretion when, as in the case under review, a case presents a question of public importance[46] and when substantial judicial labor has been expended, as evidenced by the issuance of an initial opinion.[47]

C. *Jurisdiction of a District Court When Discretionary Review Has Been Sought*

In *Portu v. State*,[48] nine days after the issuance of an opinion, the State filed a notice to invoke the discretionary jurisdiction of the supreme court.[49] Six days thereafter, the defendant filed a timely motion for clarification of the opinion in the district court.[50] In response to the motion, the State argued that its notice to invoke discretionary jurisdiction stripped the district court of the power to act on the defendant's motion.[51] The court granted the defendant's motion for clarification,[52] and the State then filed a motion to reinstate the original opinion, continuing to assert that the court lacked jurisdiction.[53]

The Third District disagreed, concluding that its jurisdiction to rule on timely filed motion does not expire until it renders an order disposing of such motions.[54] The court noted that Florida Rule of Appellate Procedure 9.020(g)(1) states that when a motion for rehearing or clarification of an

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43. *Id.*
44. *Id.*
45. *Id.*
46. The district court had certified the existence of a question of great public importance. *Id.* at 1018 n.1.
47. *Schopp*, 653 So. 2d at 1018.
48. 654 So. 2d 169 (Fla. 3d Dist. Ct. App. 1995).
49. *Id.* at 169.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Portu*, 654 So. 2d at 169.
54. *Id.*

order has been filed, the order is not deemed rendered "'until the filing of a signed, written order disposing of all such motions between such parties.'"[55] The court went on to find that since rule 9.120(b) provides that the discretionary jurisdiction of the supreme court is invoked by the filing of a notice within thirty days of rendition of the order to be reviewed,[56] the State's time for filing a notice did not even begin until the court rendered a written order disposing of the defendant's motion for clarification.[57] Accordingly, the court found the State's notice to be premature, and denied the motion to reinstate.[58]

V. ORDERS REVIEWABLE

A. *Appeals from Denials of Summary Judgment Motions Based on Claims of Qualified Immunity*

Although the *Florida Rules of Appellate Procedure* do not provide for appeals from orders denying motions for summary judgment, the supreme court, in *Tucker v. Resha*,[59] concluded that when a public official asserts qualified immunity in response to a federal civil rights claim in a Florida court, an order denying such a motion is subject to interlocutory review to the extent that the order turns on an issue of law.[60] The court's conclusion was based primarily on the reasoning of *Mitchell v. Forsyth*.[61] In that case, the Supreme Court of the United States stated that the qualified immunity of public officials involves immunity from suit rather than a mere defense to liability; that this is effectively lost if a case is erroneously permitted to go to trial; and that an order denying qualified immunity is effectively unreviewable on appeal from a final judgment, as the public official cannot be "re-immunized" if erroneously required to stand trial or face other burdens of litigation.[62]

In its opinion, the *Tucker* court specifically noted that Florida's appellate rules do not provide for interlocutory review of orders of the sort addressed by the case.[63] The court therefore requested the Florida Bar

55. *Id.* (quoting FLA. R. APP. P. 9.020(g)(1)).
56. *Id.* at 170.
57. *Id.* at 169.
58. *Portu*, 654 So. 2d at 170.
59. 648 So. 2d 1187 (Fla. 1994).
60. *Id.* at 1190.
61. 472 U.S. 511 (1985).
62. *Tucker*, 648 So. 2d at 1189 (citing *Mitchell*, 472 U.S. at 526-27).
63. *Id.* at 1189.

Appellate Court Rules Committee to submit a proposed amendment that will address the rule change mandated by this decision.[64]

Subsequently, the First District, in *Department of Education v. Roe*,[65] concluded that it would not extend *Tucker* beyond its specific facts, and thus declined to review a denial of a motion to dismiss that asserted a claim of sovereign immunity regarding a cause of action under state law.[66]

B. *Certiorari Review of Orders Permitting Plaintiffs to Amend Complaints to Include Claims for Punitive Damages*

In *Globe Newspaper Co. v. King*,[67] the supreme court resolved a conflict among the districts regarding the question of whether it is appropriate for an appellate court to review by certiorari an order of a trial court permitting a plaintiff to amend a complaint to include a punitive damages claim under section 768.72 of the *Florida Statutes*.[68]

The statute provides that "no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages."[69] The statute goes on to state that "[n]o discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted."[70]

The court indicated that it read the statute to "create a substantive legal right not to be subject to a punitive damages claim and ensuing financial worth discovery until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages."[71]

The court then noted that the Fourth District, in *Kraft General Foods, Inc. v. Rosenblum*,[72] *Henn v. Sadler*,[73] and *Sports Products, Inc. v. Estate of Inalien*,[74] ruled that the procedure established by the statute must be followed, and that the failure to adhere to that procedure is a departure from

64. *Id.* at 1190.
65. 656 So. 2d 507 (Fla. 1st Dist. Ct. App. 1995).
66. *Id.* at 507.
67. 658 So. 2d 518 (Fla. 1995).
68. *Id.* at 519.
69. FLA. STAT. § 768.72 (1993).
70. *Id.*
71. *Globe Newspaper*, 658 So. 2d at 519.
72. 635 So. 2d 106 (Fla. 4th Dist. Ct. App.), *review denied*, 642 So. 2d 1363 (Fla. 1994).
73. 589 So. 2d 1334 (Fla. 4th Dist. Ct. App. 1991) (en banc).
74. 658 So. 2d 1010 (Fla. 4th Dist. Ct. App. 1994).

the essential requirements of law. The court expressed its agreement with the Fourth District and held "that appellate courts should grant certiorari in instances in which there is a demonstration by a petitioner that the procedures of section 768.72 have not been followed."[75]

The court declined the petitioner's invitation "to take a further step . . . and hold that certiorari may also be granted to review the sufficiency of the evidence considered by a trial judge in a section 768.72 determination."[76] The court thus disapproved of the Third District's decision in *Commercial Carrier Corp. v. Rockhead*,[77] which had taken such an approach.[78] The court summed up its holding by stating:

> We specifically agree with the reasoning of the Fourth District in its decision in Sports Products, Inc., that certiorari review is appropriate to determine whether a court has conducted the evidentiary inquiry required by section 768.72, Florida Statutes, but not so broad as to encompass review of the sufficiency of the evidence considered in that inquiry.[79]

C. *Issues Certified to the Supreme Court*

In *Canal Insurance Co. v. Reed*,[80] the First District held that review is not available, either by appeal or certiorari, of an order deciding an insurance coverage issue in a third party declaratory judgment action between an insurer and its insured, prior to a final determination of liability in the underlying action, that results in the insurer having to provide liability coverage for the insured in the underlying action.[81] The court certified to the supreme court, however, as a question of great public importance, the issue of whether, under such circumstances, the insurer may seek immediate review of the order and, if so, whether such review should be by certiorari, appeal of a non-final order, or appeal of a final order.[82]

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75. *Globe Newspaper*, 658 So. 2d at 520.

76. *Id.*

77. 639 So. 2d 660 (Fla. 3d Dist. Ct. App. 1994).

78. In a humorous aside to the legal issues involved, Chief Judge Schwartz, the author of the majority opinion in *Commercial Carrier*, noting the fact that both the petitioner and the respondent were represented by attorneys with the last name of "Schwartz," stated, "[l]ike a pride of lions, and an exaltation of larks, this case involves an intelligence of (unrelated) Schwartzes." *Id.* at 661 n.*.

79. *Globe Newspaper*, 658 So. 2d at 520.

80. 653 So. 2d 1085 (Fla. 1st Dist. Ct. App. 1995).

81. *Id.* at 1090.

82. *Id.* at 1090-91.

In *Maryland Casualty Co. v. Century Construction Corp.*,[83] the First District found that a non-final order denying motions to dismiss a third-party complaint, which was entered after the entry of judgment in the main action was not appealable.[84] The court certified conflict with the decision in *Mogul v. Fodiman*,[85] which concluded that Florida Rule of Appellate Procedure 9.130(a)(4), which allows for appeals from non-final orders entered after a final order, appear "'broad enough to permit an appeal from' an order denying a motion seeking a protective order to prevent certain discovery in a supplementary proceeding."[86] The First District reasoned that "the rule was intended to apply only to orders entered after a final order which would otherwise be unreviewable."[87] The court stated: "To hold that the order sought to be appealed here is immediately reviewable pursuant to rule 9.130(a)(4) would lead inevitably to the result that *all* interlocutory orders entered in third-party actions following the entry of judgment in the main action would, likewise, be immediately reviewable."[88] The court pointed out that since such a conclusion would result in an enormous waste of scarce judicial resources, it must presume that the drafters of the rule intended no such consequence.[89]

D. *Other Cases*

As usual, the appellate courts decided a large number of cases dealing with the question of whether particular orders were subject to review. A sampling of those cases includes:

Hernando County v. Leisure Hills, Inc.[90] A partial final judgment determining that the appellee was entitled to have a plat recorded was not appealable because the trial court had reserved jurisdiction to specifically order the clerk of court at some future time to record the plat and to determine whether damages were appropriate and, if so, the amount of damages.[91]

83. 656 So. 2d 611 (Fla. 1st Dist. Ct. App. 1995).
84. *Id.* at 612.
85. 406 So. 2d 1225 (Fla. 5th Dist. Ct. App. 1981).
86. *Maryland Casualty*, 656 So. 2d at 612 (quoting *Mogul*, 406 So. 2d at 1226).
87. *Id.*
88. *Id.*
89. *Id.*
90. 648 So. 2d 257 (Fla. 5th Dist. Ct. App. 1994).
91. *Id.* at 258.

Cohen, Scherer & Cohen, P.A. v. Pacific Employers Insurance Co.[92] Found to be nonappealable was an order dismissing a counterclaim with prejudice, but leaving the main claim pending.[93] The court relied on the fact that the main claim and the counterclaim both arose out of a malpractice claim and the obligations of the parties under the insurance policy in regard to the malpractice claim.[94]

Arthur v. Gibson.[95] Certiorari was deemed an appropriate method to review a non-final order denying a motion to disqualify counsel.[96]

Waller v. Waller.[97] Not appealable was an order granting a motion to amend a complaint to add a defendant who had previously obtained a dismissal based on an allegation that the defendant had not been served with the initial complaint within the time required by the *Florida Rules of Civil Procedure.*[98]

Polo v. Polo.[99] A non-final order denying a motion to dismiss based on a claim that the initial process and pleading were not served within the time required by the *Florida Rules of Civil Procedure* was nonappealable.[100]

Gregg v. State.[101] The court stated that it had no jurisdiction to review an oral order.[102]

Valenzuela v. Valenzuela.[103] A non-final order directing a party to pay an expert witness fee prior to taking the expert's deposition was found not to be subject to review, either by appeal or by certiorari.[104]

Ramseyer v. Williamson.[105] A trial court's order denying a motion to dissolve a writ of garnishment was not appealable.[106]

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92. 654 So. 2d 282 (Fla. 4th Dist. Ct. App. 1995).
93. *Id.* at 283.
94. *Id.*
95. 654 So. 2d 983 (Fla. 5th Dist. Ct. App. 1995).
96. *Id.* at 984.
97. 650 So. 2d 193 (Fla. 2d Dist. Ct. App. 1995).
98. *Id.* at 194.
99. 643 So. 2d 55 (Fla. 3d Dist. Ct. App. 1994).
100. *Id.* at 56.
101. 643 So. 2d 106 (Fla. 1st Dist. Ct. App. 1994).
102. *Id.* at 107.
103. 648 So. 2d 741 (Fla. 3d Dist. Ct. App. 1994).
104. *Id.* at 741.
105. 639 So. 2d 205 (Fla. 5th Dist. Ct. App. 1994).
106. *Id.* at 206.

City of Dania v. Broward County.[107] Orders denying motions to intervene in eminent domain proceedings were held to be appealable, final orders.[108]

Stufflebean v. Ohio Casualty Insurance Co.[109] An order granting a defendant's motion for partial summary judgment, and holding that under the doctrine of collateral estoppel, a jury verdict in another case was determinative of the negligence and comparative negligence of the parties, was held not to be appealable by the plaintiff.[110] The plaintiff argued that the order was appealable under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv), which allows for review of orders that determine the issue of liability in favor of a party seeking affirmative relief. The court relied on the fact that the jury verdict had found the plaintiff sixty-five percent at fault in causing the accident and the fact that the plaintiff had opposed the application of collateral estoppel. Under these circumstances, the court found that the order was not one in favor of the plaintiff, who was the only party seeking affirmative relief, and thus was not appealable.[111]

Ownby v. Ownby.[112] The court reviewed by certiorari an order in a dissolution of marriage action requiring the husband to comply with a stipulation in which he agreed to submit to a blood test to determine paternity.[113]

Bierman v. Miller.[114] Certiorari was employed to review an order vacating a stay in a legal malpractice action.[115]

Robert v. W.R. Grace & Co.[116] The court concluded that the denial of a request to perpetuate testimony by a terminally ill person is a matter which may be entertained by petition for writ of certiorari.[117]

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107. 658 So. 2d 163 (Fla. 4th Dist. Ct. App. 1995).
108. *Id.* at 164.
109. 645 So. 2d 136 (Fla. 4th Dist. Ct. App. 1994).
110. *Id.* at 137.
111. *Id.*
112. 639 So. 2d 135 (Fla. 5th Dist. Ct. App. 1994).
113. *Id.* at 136.
114. 639 So. 2d 627 (Fla. 3d Dist. Ct. App. 1994).
115. *Id.* at 627.
116. 639 So. 2d 1056 (Fla. 3d Dist. Ct. App. 1994).
117. *Id.* at 1057.

Oenbrink, D.O. v. Schiegner.[118] The court recognized that certiorari review may be used to challenge an order that denies a motion to dismiss for failure to comply with the statutory presuit notice requirements.[119]

Hickey v. Pompano K of C, Inc.[120] Certiorari was deemed appropriate to review an order severing a plaintiff's trial against one defendant from her trial against a codefendant.[121]

Medero v. Florida Power & Light Co.[122] The court reviewed by certiorari an order denying the plaintiff's motion to compel the deposition of an executive employed by the defendant.[123]

Pevsner v. Frederick.[124] A non-party witness was found to have the right to certiorari review of an order imposing sanctions against him for discovery violations.[125]

Becker & Poliakoff v. King.[126] Certiorari was deemed the proper method of reviewing an order denying a law firm's motion to withdraw as counsel.[127]

Randall v. Guenther.[128] A non-final discovery order compelling a party to testify after she invoked her privilege against self-incrimination was a proper subject of certiorari review.[129]

VI. RENDITION

A. *Rubber-Stamped Form Orders*

The Second District dealt with a series of cases[130] that concerned the issue of whether orders were rendered when trial judges ruled on them by using a form order rubber stamp on motions, filling in blanks to indicate the

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118. 645 So. 2d 167 (Fla. 4th Dist. Ct. App. 1994), *review denied*, 654 So. 2d 131 (Fla. 1995).

119. *Id.* at 167.

120. 647 So. 2d 270 (Fla. 4th Dist. Ct. App. 1994).

121. *Id.* at 271.

122. 658 So. 2d 566 (Fla. 3d Dist. Ct. App. 1995).

123. *Id.* at 567.

124. 656 So. 2d 262 (Fla. 4th Dist. Ct. App. 1995).

125. *Id.* at 263.

126. 642 So. 2d 821 (Fla. 4th Dist. Ct. App. 1994).

127. *Id.* at 822.

128. 650 So. 2d 1070 (Fla. 5th Dist. Ct. App. 1995).

129. *Id.* at 1072-73.

130. Parnell v. State, 642 So. 2d 1092 (Fla. 2d Dist. Ct. App. 1994); Gibson v. State, 642 So. 2d 43 (Fla. 2d Dist. Ct. App. 1994); Davenport v. State, 640 So. 2d 1225 (Fla. 2d Dist. Ct. App. 1994); State v. Sullivan, 640 So. 2d 77 (Fla. 2d Dist. Ct. App. 1994).

date and whether the motions were granted or denied and signing beneath the stamp.[131] The court indicated that while it did "not discourage the use of a short form order stamped on the face of a motion[,] . . . such an order should not be used when it is essential to fix a point from which crucial time periods are to be calculated for purposes of rendition."[132] The court's primary problem with the use of such orders was the fact that there was no indication that the orders were ever filed with the clerk of the circuit court,[133] a requirement for rendition, as that term is defined by Florida Rule of Appellate Procedure 9.020(g).[134] In light of the fact that a trial court's order "is not appealable until it is rendered,"[135] the Second District dismissed each of the appeals as premature and remanded the matters with directions to the trial courts to render appropriate orders.[136]

In *Parnell*, however, the court may have given an indication as to how such form orders could be used in a manner that would result in rendition. In finding that there was no indication that the order there was filed, the court stated: "When the document does not receive a second date stamp from the clerk, there is nothing on the face of the appellate record to establish that the order has ever been rendered."[137] This language would seem to imply that rendition would occur if, after a trial court enters a rubber-stamped order, the clerk would place a date stamp on the motion indicating that the motion was refiled after the order was entered.

B. *Court Status Forms*

In *State v. Tremblay*,[138] the Fourth District addressed a contention that an order was rendered when the trial court signed and filed a court status form reflecting that a charge was dismissed.[139] The court denied a motion

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131. The use of such stamps was apparently widespread by the judges of one particular circuit, since the four appeals cited in the preceding footnote were from orders entered by four different judges in the same circuit.

132. *Sullivan*, 640 So. 2d at 78.

133. *Parnell*, 642 So. 2d at 1093; *Gibson*, 642 So. 2d at 44; *Davenport*, 640 So. 2d at 1225; *Sullivan*, 640 So. 2d at 78.

134. In pertinent part, rule 9.020(g) provides that "[a]n order is rendered when a signed, written order is filed with the clerk of the lower tribunal." FLA. R. APP. P. 9.020(g).

135. *Sullivan*, 640 So. 2d at 78 (quoting Billie v. State, 473 So. 2d 34, 34 (Fla. 2d Dist. Ct. App. 1985)).

136. *Parnell*, 642 So. 2d at 1093; *Gibson*, 642 So. 2d at 44; *Davenport*, 640 So. 2d at 1225-26; *Sullivan*, 640 So. 2d at 78.

137. *Parnell*, 642 So. 2d at 1093.

138. 642 So. 2d 64 (Fla. 4th Dist. Ct. App. 1994).

139. *Id.* at 65.

to dismiss that was based on this contention, finding no authority to the effect that a status form constituted a final, appealable order.[140] The court went on to warn, however, that "although that day has not arrived, we can envision an occasion when a peculiar set of circumstances might lead us to conclude that a court status form might be found appealable."[141] Thus, the court felt "compelled to comment that it would behoove the bench and bar to take precautionary measures in this regard,"[142] such as "for the trial judge to make it clear on the record that a subsequent written order will be prepared, and that any sheet of paper the judge signs which records a particular ruling as a docket entry, is not intended to be the order subject to be appealed."[143]

VII. VENUE

In *Vasilinda v. Lozano*,[144] the supreme court adopted the following principles to be applied to determine in which court appellate jurisdiction lies when the trial court has granted a change of venue to a circuit located within another district:

> (1) Changes of venue in criminal cases do not become effective until the court file has been received in the transferee court. Changes of venue in civil cases do not become effective until the court file has been received in the transferee court and costs and service charges required by section 47.191, Florida Statutes (1991), and Florida Rule of Civil Procedure 1.060 which are applicable to the case are paid.
>
> (2) Appellate jurisdiction is determined at the time the notice of appeal or petition for extraordinary writ is filed. If the change of venue has not yet become effective when the notice or petition is filed, appellate jurisdiction lies in the district court of appeal which serves as the appellate court for the transferor court. That district court of appeal shall retain jurisdiction of the matter before it even though the change of venue is later effected. Once the change of venue has become effective, appellate jurisdiction shall be in the district court of appeal which serves as the district court of appeal for the transferee court, even if the challenged order was entered before the change of venue. Of

140. *Id.* at 66.
141. *Id.* (footnotes omitted).
142. *Id.*
143. *Tremblay*, 642 So. 2d at 66.
144. 631 So. 2d 1082 (Fla. 1994).

course, the time for filing appeals and petitions for certiorari shall run from the date of the challenged order.[145]

The First District was called upon to interpret one aspect of *Vasilinda* in *Cottingham v. State*.[146] In that case, an inverse condemnation matter, a circuit judge in Hernando County, which is located within the Fifth District, entered an order transferring venue to Leon County, which is located within the First District.[147] The order provided that the plaintiffs should pay the service charge to the clerk of court of Hernando County and directed the clerk to effect the transfer to Leon County upon proof of payment of the service charge.[148] Before the service charge was paid, the clerk mailed the file to Leon County.[149] The clerk of court in Leon County advised the appellants by telephone that the file had been received and that payment of a transfer fee was required.[150] The following day, counsel for appellants sent a notice of appeal by overnight mail to the clerk for Hernando County.[151] Later that day, counsel mailed the transfer fee to the clerk for Leon County.[152] The fee was accompanied by a letter explaining that a notice of appeal had been filed in the circuit court of Hernando County, appealing the case to the Fifth District.[153] The notice of appeal was received by the clerk in Hernando County, and four days later, the transfer fee was received by the clerk in Leon County.[154]

The State filed a motion to dismiss in the Fifth District, erroneously asserting that the required fee had been paid four days before the notice of appeal was mailed.[155] The Fifth District denied the motion, but transferred the appeal to the First District.[156] The First District concluded that because the notice of appeal was filed in the circuit court in Hernando County before the transfer fee was received in Leon County, jurisdiction of

145. *Id.* at 1087 (footnotes omitted).
146. 656 So. 2d 597 (Fla. 1st Dist. Ct. App. 1995).
147. *Id.* at 598.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Cottingham*, 656 So. 2d at 598.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Cottingham*, 656 So. 2d at 598.

the appeal lay solely in the Fifth District,[157] and transferred the case back to that court.[158]

The court rejected the argument that the transfer was complete when the transfer fee was mailed,[159] but certified the following question as one of great public importance:

> FOR PURPOSES OF THE RULE ANNOUNCED IN *VASILINDA V. LOZANO*, 631 SO.2D 1082 (FLA. 1994), IS THE DATE OF PAYMENT OF THE TRANSFER FEES AND CHARGES THE DATE OF RECEIPT OF SUCH CHARGES BY THE TRANSFEREE COURT OR THE DATE OF MAILING BY THE PARTY RESPONSIBLE FOR PAYMENT?[160]

VIII. NOTICE OF APPEAL

A. *Impact of a Notice of Appeal on Pending Motions in the Trial Court*

The Fourth District, in *Kennedy v. Alberto*,[161] addressed the question of whether pending post-judgment motions which do not delay rendition of the judgment, pursuant to Florida Rule of Appellate Procedure 9.020(g)(3), are deemed abandoned by the filing of a notice of appeal directed to the judgment.[162] The court initially recognized that the post-judgment motions named in rule 9.020(g) that suspend rendition of the judgment to which they are directed are considered abandoned by the filing of a notice of appeal before their disposition.[163] These motions are timely and authorized "for new trial or rehearing, clarification, or certification; motions to alter or amend; for judgment notwithstanding verdict or in accordance with prior motion for directed verdict, or in arrest of judgment; or a challenge to the verdict."[164]

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157. *Id.* at 599.
158. *Id.* at 597.
159. *Id.* at 599.
160. *Id.*
161. 649 So. 2d 286 (Fla. 4th Dist. Ct. App. 1995).
162. *Id.* at 287.
163. *Id.*
164. FLA. R. APP. P. 9.020(g).

Noting that the case under review was not concerned with one of the orders set forth in the rule, but with a motion for relief from judgment under Florida Rule of Civil Procedure 1.540(b),[165] the court stated:

> We do not believe, therefore, that motions filed after final judgment which are not named in rule 9.020(g) and do not suspend rendition are deemed abandoned by a later filed notice of appeal directed to the judgment itself. Among this class of motions are motions for writ of garnishment, motions to tax costs or award attorney's fees, motions for proceedings supplementary, and motions for relief from judgment under rule 1.540(b).[166]

The Second District also dealt with the impact of a notice of appeal on a pending motion. In *Rice v. Brown*,[167] the court concluded that the filing of a notice of appeal from a final judgment and the denial of a motion for new trial constituted an abandonment of a motion for remittitur and divested the trial court of jurisdiction to rule on that motion.[168]

B. *Filing in the Proper Court*

In *Upshaw v. State*,[169] the appellant sought to appeal an order entered by the Circuit Court for Eighth Judicial Circuit in Baker County.[170] A notice of appeal was filed with the court clerk in Alachua County, which is also located in the Eighth Circuit.[171] Although efforts to do so may have been made by the appellant and by the Alachua County court clerk, no notice was ever filed with the Baker County court clerk.[172] The First District refused to consider the appeal, holding "that when a party initiates an appeal . . . by filing a notice of appeal in circuit court, the notice must be filed in the circuit court in the county where the original proceeding was

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165. *Kennedy*, 649 So. 2d at 288. As the court noted, not only is such a motion not set forth in the appellate rule as one which delays rendition of a judgment, but rule 1.540(b) expressly states that "[a] motion under this sub-division does not affect the finality of a judgment or decree or suspend its operation." *Id.* (quoting FLA. R. CIV. P. 1.540(b)).

166. *Kennedy*, 649 So. 2d at 288.

167. 645 So. 2d 1020 (Fla. 2d Dist. Ct. App. 1994), *review denied*, 658 So. 2d 992 (Fla. 1995).

168. *Id.* at 1021.

169. 641 So. 2d 451 (Fla. 1st Dist Ct. App. 1994).

170. *Id.* at 452.

171. *Id.*

172. *Id.*

pending to validly invoke appellate jurisdiction."[173] The court recognized that the supreme court has liberally construed the appellate rules "to allow valid invocation of appellate jurisdiction when an appellant or petitioner has not strictly filed the notice in the correct court,"[174] but pointed out that those supreme court cases involved situations in which the party invoking appellate jurisdiction filed a timely notice either with the district court of appeal or with the correct lower tribunal.[175] "In this case," the court concluded, "petitioner did neither, so we are without jurisdiction of the appeal."[176]

C. *Timeliness*

In *Metropolitan Dade County v. Vasquez*,[177] the appellant, on the last day for filing a timely notice of appeal, forwarded its notice to a private carrier with directions to deliver it that day to the Judge of Compensation Claims.[178] The courier did not reach the building housing the judge's office until 5:05 p.m. and the security guard would not permit her to enter the building or leave the package at the building site.[179] The appellee then moved to dismiss, arguing that the notice, which was filed on the next business day, three days later, was not timely filed.[180] The appellant maintained that because the notice was delivered for filing within the required period, it should be treated as timely.[181]

The First District dismissed the appeal, finding that the "attempt to deliver a notice of appeal" under the circumstances of the case was not sufficient to invoke the jurisdiction of the court.[182] In doing so, the court stated: "A party who waits until the last available day to file its notice of appeal, and who fails to assure that the notice is delivered prior to the close of the business day bears the risk that it will be denied access to file the notice 'after hours.'"[183]

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173. *Id.*

174. *Upshaw*, 641 So. 2d at 453 (citing Alfonso v. Department of Envtl. Regulation, 616 So. 2d 44 (Fla. 1993); Skinner v. Skinner, 561 So. 2d 260 (Fla. 1990); Johnson v. Citizens State Bank, 537 So. 2d 96 (Fla. 1989)).

175. *Upshaw*, 641 So. 2d at 453.

176. *Id.*

177. 659 So. 2d 355 (Fla. 1st Dist. Ct. App. 1995).

178. *Id.* at 355.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Vasquez*, 659 So. 2d at 356.

183. *Id.*

D. *Amended Judgments*

In *Wetherington v. Minch*,[184] the appellant did not timely appeal from a final judgment of foreclosure, but attempted to appeal from an amended final judgment which changed the sale date and awarded additional interest.[185] The Fifth District first noted that the amendment of a final judgment which does not change matters of substance or resolve a genuine ambiguity does not toll the time within which the parties must seek review.[186] The court then pointed out that an appeal from an amended final judgment is "'limited to the party adversely affected by the amendment and should involve only those issues affected by the amendment.'"[187] Since the appellant raised no challenges involving the amendments, and failed to timely appeal the original judgment, the court dismissed the appeal.[188]

E. *Amendment of Notice of Appeal*

The Third District, in *Ashraf v. Smith*,[189] denied a motion to amend a notice of appeal to include the appellant's insurer.[190] Although the court found the amendment "entirely unnecessary" under the facts of the case, the denial of the motion was based on the court's determination that it "lack[ed] the jurisdiction to permit such an amendment."[191]

IX. INDIGENCY

In *Schwab v. Brevard County School Board*,[192] the Fifth District dealt with a contention that a 1994 amendment to section 57.081(1) of the *Florida Statutes* lifted the burden of determining indigency for purposes of appeal from the circuit court and allows individuals to proceed as indigents upon the filing by counsel of a certificate of indigency in the appellate court.[193] Prior to the amendment, the statute required an indigent person to submit an

184. 637 So. 2d 967 (Fla. 5th Dist. Ct. App. 1994).
185. *Id.* at 967.
186. *Id.*
187. *Id.* (quoting First Continental Corp. v. Khan, 605 So. 2d 126, 130 (Fla. 5th Dist. Ct. App.), *review denied*, 613 So. 2d 3 (Fla. 1992)).
188. *Id.*
189. 647 So. 2d 892 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 658 So. 2d 989 (Fla. 1995).
190. *Id.* at 893.
191. *Id.*
192. 650 So. 2d 1099 (Fla. 5th Dist. Ct. App. 1995).
193. *Id.* at 1101.

affidavit of indigency and, if represented by counsel, a certificate from counsel indicating, among other things, that counsel had made an investigation to ascertain the truth of the affidavit and believed it to be true.[194] The amended statute eliminates the requirement of an affidavit if the attorney files a certificate certifying that the attorney has made an investigation to ascertain the financial condition of the client and has found the client to be indigent.[195]

The court rejected the contention that in light of the change, the trial court was no longer required to make a determination of indigency.[196] The court pointed out that although the old version of the statute did not specify where the determination of indigency should be made, the court in *Chappell v. Department of Health & Rehabilitative Services*,[197] had concluded that a party seeking to obtain a waiver of appellate court fees must file a motion in the lower tribunal, along with the affidavit and certificate required by the statute.[198] The court then stated that "[t]he amendments to the statute reflect a change in the requirements an indigent person must meet in order to be exempt from payment of charges,"[199] not the question of "where such a determination must be made."[200]

This determination, the court continued, is procedural in nature and is therefore governed by the procedural rules promulgated by the supreme court.[201] Among those rules, the court noted, are Florida Rule of Appellate Procedure 9.430, which requires a party who has the right to seek review without the payment of costs to file a motion in the lower tribunal, and Florida Rule of Judicial Administration 2.040(b)(3), which states that fees will be paid as provided by law except when a party has been

194. FLA. STAT. § 57.081(1) (1980). Counsel was also required to certify that he or she had investigated the nature of the applicant's position, that, in counsel's opinion, the position was meritorious as a matter of law, that counsel had not been paid or promised payment of any remuneration for services, and that counsel intended to act as attorney for the applicant without compensation.

195. *Schwab*, 650 So. 2d at 1101-02 (citing FLA. STAT. § 57.081 (Supp. 1994)). The revised statute retains the additional requirements for the certificate that are set forth in the preceding footnote.

196. *Id.* at 1102.

197. 391 So. 2d 358 (Fla. 5th Dist. Ct. App. 1980).

198. *Schwab*, 650 So. 2d at 1101.

199. *Id.* at 1102.

200. *Id.*

201. *Id.*

"adjudicated insolvent."[202] Each of these rules, the court concluded, contemplates some action being taken by the lower tribunal.[203]

Citing to *Schwab* and to the two above-noted rules, the Fourth District, in *McFadden v. West Palm Beach Police Officer*,[204] indicated that it found no authority for appellate courts to sua sponte determine the issue of indigency in direct appeals.[205] The court contrasted this fact with the its authority in original proceedings to issue orders of indigency.[206] The court then stated:

> A welcome change in the rule to allow the clerks of the appellate court to determine indigency from the affidavit, providing for a remand to the trial court for a hearing on indigency where indicated by the circumstances of the case or the affidavit, would allow indigents more expeditious access to the court without a significant burden.[207]

In *Keene v. Nudera*,[208] the Second District set forth the "procedures for filing appeals and original proceedings for indigent clients in civil cases."[209] With regard to appeals, the court stated:

> An attorney who plans to appeal an order for an indigent client must timely file a motion in the trial court requesting an order of indigency for purposes of appeal. That order must be obtained either before filing the notice of appeal or shortly thereafter. If the indigency order is not obtained prior to the commencement of the appeal, the attorney should advise this court in writing concerning the status of that order. Attorneys should be aware the rules of appellate procedure do not require the lower tribunal to automatically send this court a copy of such an order. It is the appellant's responsibility to provide this court with a copy of the order of indigency. This court will normally dismiss an appeal after thirty days' notice if the filing fee is not paid or an order of indigency is not filed.[210]

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202. *Id.*
203. *Schwab*, 650 So. 2d at 1102.
204. 658 So. 2d 1047 (Fla. 4th Dist. Ct. App. 1995).
205. *Id.* at 1048.
206. *Id.*
207. *Id.*
208. 20 Fla. L. Weekly D1232 (2d Dist. Ct. App. May 19, 1995).
209. *Id.* at D1232.
210. *Id.* at D1233.

With regard to original proceedings, the court noted that the great majority of such cases "seek review of orders entered by circuit courts, as 'lower tribunals.'"[211] In light of the language of Florida Rule of Appellate Procedure 9.430, which states that a party who has a right to "seek review" without payment of costs shall file a motion in the lower tribunal, the court concluded that "a circuit court, as the lower tribunal, is authorized to enter an order of indigency for an original proceeding, just as it must resolve that issue for a direct appeal of a final or nonfinal order."[212]

The court pointed out, however, that there are situations, such as cases in which mandamus or prohibition is sought, in which it may not be feasible to obtain an order from the lower tribunal.[213] Additionally, the court recognized that in some instances, an original proceeding is filed to challenge the decision of a governmental entity that is defined as a "lower tribunal," but is not a typical judicial forum.[214] In light of situations such as these, the court stated: "To assure access to this court, we allow petitioners to file their motion for an order of indigency, along with a sufficient affidavit, in this court even when a 'lower tribunal' may exist."[215]

The court indicated that a motion filed in the appellate court should accompany the petition and that, as with direct appeals, an original proceeding will normally be dismissed after thirty days' notice if the filing fee is not paid or if a sufficient motion and affidavit is not filed with the court.[216] The court also noted that neither the *Florida Rules of Appellate Procedure* nor the most frequently used Florida practice manuals contain forms useful in obtaining an order of indigency for appeal.[217] Therefore, the court appended to its opinion a form affidavit[218] and a form order[219] for use in such situations.

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211. *Id.*
212. *Id.*
213. *Keene*, 20 Fla. L. Weekly at D1234.
214. *Id.* at D1233-34.
215. *Id.* at D1234.
216. *Id.*
217. *Id.*
218. *Keene*, 20 Fla. L. Weekly at D1234-35.
219. *Id.* at D1234.

X. MOTIONS

In *Sarasota County v. Ex*,[220] the Second District prefaced its discussion of the merits of the case with some comments about the "tendency for motions to proliferate because lawyers simply will not permit an adversary to have the last word."[221] The court's concern grew from a series of pleadings that included a motion to strike two notices of supplemental authority, a reply to that motion, a motion to strike the reply, and a response to the motion to strike the reply.[222] The court pointed out that none of the filings were necessary or helpful to the court,[223] and stated: "Lawyers need to realize that appellate motion practice is not a game of ping-pong in which the last lawyer to serve wins."[224] The court went on to say: "In most cases, motions to strike motions and other similar pleadings are simply unauthorized responses that demonstrate an attorney's lack of self-discipline."[225]

XI. TRANSCRIPTS

A number of cases dealt with the absence of a transcript as a part of the record on appeal. The manner in which such absences were dealt with varied depending upon the facts of the case and the nature of the issues raised. In some instances, courts relied upon the principle that when an error is apparent on the face of the judgment, reversal is appropriate despite the lack of a transcript.[226] Similarly, other cases concluded that when the record provided was sufficient to review a legal issue on the merits, the absence of a trial transcript,[227] or a portion of the transcript, did not require affirmance.[228] Other factual situations, however, led to conclusions that cases should be affirmed because of the lack of a transcript. Such conclusions were reached in cases in which appellants failed to provide

220. 645 So. 2d 7 (Fla. 2d Dist. Ct. App. 1994), *review denied*, 654 So. 2d 918 (Fla. 1995).

221. *Id.* at 7.

222. *Id.* at 8.

223. *Id.*

224. *Id.* at 7-8.

225. *Sarasota County*, 645 So. 2d at 8.

226. Sugrim v. Sugrim, 649 So. 2d 936, 937 (Fla. 1st Dist. Ct. App. 1995); Hirsch v. Hirsch, 642 So. 2d 20, 21 (Fla. 5th Dist. Ct. App. 1994).

227. *In re* Estate of Smith, 644 So. 2d 158 (Fla. 4th Dist. Ct. App. 1994).

228. Velez v. State, 645 So. 2d 42, 43 (Fla. 4th Dist. Ct. App. 1994).

transcripts of evidentiary hearings that formed the basis for factual findings by a trial court[229] or an appeals referee.[230]

In *Selig v. Sandler*,[231] the Third District affirmed trial court orders striking a complaint as a sham pleading when the appellant failed to provide the court "with a transcript of the evidentiary hearing or a proper substitute."[232]

In two other cases, courts found that items offered by appellants in lieu of transcripts did not constitute substitutes that were sufficiently proper to allow for review of either the entire case or of certain issues. In *All American Soup and Salad, Inc. v. Colonial Promenade*,[233] the Fifth District found to be without merit the appellant's contention that its written closing argument was a "proper substitute" for a transcript of a non-jury trial.[234] In *Travieso v. Golden*,[235] the appellant submitted nine videotapes of deposition testimony as a substitute for a transcript. The Fourth District noted its "disapproval of this procedure,"[236] and stated:

> The use of videotapes on appeal in lieu of a written transcript is not authorized by any rule and would be counterproductive to efficient review by the court. We judges can digest a transcript covering a day's worth of trial with far more dispatch than we can watch the same events unfold on eight hours of videotape. While video may eventually provide useful *supplements* to a written record, efficient use of appellate court time requires the submission of a written transcript of trial proceedings.[237]

XII. BRIEFS

A. *Cross-References*

In its consideration of two separate death penalty appeals taken by the same defendant, the supreme court discussed issues relating to the practice

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229. Huey v. Huey, 643 So. 2d 1141, 1143 (Fla. 4th Dist. Ct. App. 1994).

230. Wolfson v. Unemployment Appeals Comm'n, 649 So. 2d 363, 363 (Fla. 5th Dist. Ct. App. 1995).

231. 642 So. 2d 766 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1196 (Fla. 1995).

232. *Id.* at 766.

233. 652 So. 2d 911 (Fla. 5th Dist. Ct. App. 1995).

234. *Id.* at 912.

235. 643 So. 2d 1134 (Fla. 4th Dist. Ct. App. 1994).

236. *Id.* at 1136.

237. *Id.*

of referring in a brief to briefs and records in other cases. In *Johnson v. State*,[238] the court stated that "cross-referenc[ing] a brief from a separate case is impermissible under any circumstances because it may confuse factually inapposite cases, it leaves appellate courts the task of determining which issues are relevant (which is counsel's role), and it circumvents the page-limit requirements."[239] The court went on to hold that the proper method of bringing before the court matters that are contained in separate records of pending cases is by way of a motion to supplement the record, not by a request for the taking of judicial notice.[240] The court stated that "any attempt to cross-reference separate records of pending cases will constitute grounds for the opposing party to move to strike the cross-reference."[241] Further, the court indicated that "[a]ny order striking a cross reference shall constitute automatic notice to counsel that the record must be supplemented" and that the failure to supplement under such circumstances will work a procedural bar as to the matters at issue in the improperly cross-referenced material.[242]

In the same defendant's companion appeal, *Johnson v. State*,[243] the court addressed the defendant's request that the court consider issues raised in his other case.[244] Concluding that "it clearly is not proper for counsel to attempt to cross-reference issues from a *brief* in a distinct case pending in the same court," the court found that all available issues not raised in the briefs filed in the case were barred.[245]

B. *Cross-Reply Briefs*

In *The Katz Family Partnership v. Placenti*,[246] the Third District acknowledged that Florida Rule of Appellate Procedure 9.130 on its face gives the impression that a cross-reply brief may be filed as a matter of course in an appellate proceeding,[247] but concluded that such briefs may only be filed if there is a cross-appeal.[248] The issue apparently arose from

238. 20 Fla. L. Weekly S347 (July 13, 1995).
239. *Id.* at S348.
240. *Id.*
241. *Id.*
242. *Id.*
243. 20 Fla. L. Weekly S343 (July 13, 1995).
244. *Id.* at S345.
245. *Id.*
246. 648 So. 2d 296 (Fla. 3d Dist. Ct. App. 1995).
247. *Id.* at 296.
248. *Id.* at 297 n.1.

the wording of rule 9.130(e), which establishes the time for the filing of appellants' initial briefs in appeals from non-final orders, but which goes on to state that "[a]dditional briefs shall be served as prescribed by rule 9.210."[249] Rule 9.210 establishes the general time requirements for serving briefs and includes such a requirement for the service of cross-reply briefs.[250] As noted and relied upon by the Third District,[251] however, the 1977 committee note to rule 9.210 refers to the fact that a cross-reply brief may be filed "if a cross-appeal or petition has been filed."[252]

XIII. ORAL ARGUMENT BY VIDEO TELECONFERENCE NETWORK

The First District broke new ground by establishing a procedure to conduct oral arguments by the use of a video teleconferencing network.[253] In its administrative order governing such arguments, the court indicated that video teleconferencing equipment was being installed in Jacksonville, Orlando, West Palm Beach, Miami, Ft. Myers, and Tampa.[254] The court stated that "all requests for oral argument from attorneys located in or near these cities will be deemed to request oral argument by use of the video teleconference network unless the request explicitly specifies that the oral argument be held in the courtroom at Tallahassee, Florida,"[255] where the court is located. The court further indicated that, "[i]nitially, argument by video teleconference network will be granted only when all the attorneys expected to present argument are located near a single remote facility," but that, in the future, "the court expects to schedule attorneys at two or more remote facilities."[256] The administrative order requires the party requesting argument to submit to the clerk of the court, within ten days of the order granting oral argument, a fee in the amount specified in the order to cover the costs of the video teleconference for that argument.[257] Failure to submit the fee, which will be taxable as costs in favor of the prevailing party, will be deemed a waiver of the request for oral argument.[258] Fees

249. FLA. R. APP. P. 9.130(e).
250. FLA. R. APP. P. 9.210(f).
251. *Katz Family Partnership*, 648 So. 2d at 297 n.1.
252. FLA. R. APP. P. 9.210 (1977 comm. notes).
253. *In re* Oral Argument By Video Teleconference Network, 648 So. 2d 763 (Fla. 1st Dist. Ct. App. 1994).
254. *Id.* at 763.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Oral Argument*, 648 So. 2d at 763.

will be nonrefundable if oral argument is canceled at the request of the parties, but they will be refunded if oral argument is canceled by the court.[259] The court also noted that it may, on its own motion, require that oral argument be conducted in Tallahassee,[260] and that it will also continue to schedule oral arguments throughout the district as provided in section 35.11 of the *Florida Statutes*.[261]

XIV. CERTIORARI REVIEW OF A DECISION OF A CIRCUIT COURT ACTING IN ITS APPELLATE CAPACITY

The supreme court, in *Haines City Community Development v. Heggs*,[262] clarified the standard of review for a district court to apply when reviewing a decision of a circuit court acting in its appellate capacity. After discussing the history of the common law writ of certiorari in Florida,[263] the court focused its attention on two of its previous decisions that had used different language in setting forth the appropriate standard.[264]

In *Combs v. State*,[265] a case in which the circuit court had reviewed by appeal a county court conviction for driving while intoxicated, the supreme court had concluded that "a district court's review of an appellate circuit court decision should determine whether there was a 'departure from the essential requirements of law.'"[266] The court "emphasized that there must be 'a violation of a clearly established principle of law resulting in a miscarriage of justice.'"[267]

Subsequently, in *Educational Development Center v. City of West Palm Beach*,[268] a case in which the circuit court had reviewed by certiorari a decision of an administrative agency, the supreme court, relying on *City of Deerfield Beach v. Vaillant*,[269] concluded that "a district court's review of an appellate circuit court's decision which reviewed an administrative

259. *Id.*
260. *Id.*
261. *Id.*
262. 658 So. 2d 523 (Fla. 1995).
263. *Id.* at 525.
264. *Id.* at 528-29.
265. 436 So. 2d 93 (Fla. 1983).
266. *Haines City*, 658 So. 2d at 529 (quoting *Combs*, 436 So. 2d at 95).
267. *Id.* (quoting *Combs*, 436 So. 2d at 96).
268. 541 So. 2d 106 (Fla. 1989).
269. 419 So. 2d 624 (Fla. 1982).

agency decision should consider whether the 'circuit court afforded procedural due process and applied the correct law.'"[270]

The question the court addressed in *Haines City* was "whether these two standards are different, and, if so, whether a difference is justified."[271] The court answered by indicating that "'appl[ying] the correct law' is synonymous with 'observing the essential requirements of law'" and that, "[t]herefore, when the *Combs* and *EDC* standards are reduced to their core, they appear to be the same."[272] Thus, the court found that the standard for a district court is the same regardless of whether the circuit court reviewed a matter by appeal or by certiorari. As set forth in *Haines City*, the standard is as follows: "The inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law. As explained above, these two components are merely expressions of ways in which the circuit court decision may have departed from the essential requirements of the law."[273] The court went on to give some insight into the nature of the standard:

> This standard, while narrow, also contains a degree of flexibility and discretion. For example, a reviewing court is drawing new lines and setting judicial policy as it individually determines those errors sufficiently egregious or fundamental to merit the extra review and safeguard provided by certiorari. This may not always be easy since the errors in question must be viewed in the context of the individual case. It may also be true that review of administrative decisions may be more difficult, since care must be exercised to determine the nature of the administrative proceeding under review, and to distinguish between quasi-judicial proceedings and those legislative in nature. There is no complete catalog that the court can turn to in resolving a particular case.[274]

XV. STANDING

Lack of standing has caused the appellate courts to refuse to reach the merits in several cases. In *Department of Health & Rehabilitative Services v. B.S.*,[275] the Department of Health and Rehabilitative Services sought

270. *Haines City*, 658 So. 2d at 529.
271. *Id.* at 529-30 (footnote omitted).
272. *Id.* at 530.
273. *Id.*
274. *Id.* at 530-31 (footnote omitted).
275. 640 So. 2d 1174 (Fla. 5th Dist. Ct. App. 1994).

certiorari review of an order adjudicating a minor delinquent and detaining him pending disposition.[276] The minor neither appealed nor sought release by way of habeas corpus.[277] The court denied certiorari[278] because it concluded that the claimed procedural problems and statutory violations "would have to be raised by someone with standing to argue on the minor's behalf."[279]

In *O'Neal v. Sun Bank*,[280] the court concluded that individuals against whom a foreclosure action was brought lacked standing to appeal an order allowing settlement between two creditors of a dispute as to the priority of certain portions of receivership funds, when the individuals claimed no entitlement of those funds.[281]

In *Bodenstab v. Department of Professional Regulation*,[282] the court dismissed an appeal from an order reconsidering an earlier negative determination and finding the appellant, a physician, eligible for licensure by endorsement in Florida.[283] On appeal, the appellant argued that the Board of Medicine had repudiated a stipulation by failing to incorporate in its order certain new evidence that was favorable to him.[284] The court concluded that since the appellant had been granted licensure, he was not "adversely affected" by the Board's order,[285] and therefore, not entitled to seek review pursuant to section 120.68(1) of the *Florida Statutes*,[286] which governs appeals of the sort presented by the case.

XVI. IMPACT OF PRIOR DETERMINATIONS

A. *Law of the Case*

In *State v. Owen*,[287] the Fourth District dealt with a situation in which a criminal defendant faced a retrial after the Supreme Court of Florida

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276. *Id.* at 1175.
277. *Id.*
278. *Id.* at 1176.
279. *Id.* at 1175.
280. 644 So. 2d 177 (Fla. 5th Dist. Ct. App. 1994).
281. *Id.* at 178.
282. 648 So. 2d 742 (Fla. 1st Dist. Ct. App. 1994), *review denied*, 659 So. 2d 1085 (Fla. 1995).
283. *Id.* at 742.
284. *Id.* at 743.
285. *Id.*
286. *Id.*
287. 654 So. 2d 200 (Fla. 4th Dist. Ct. App. 1995).

reversed his conviction due to its conclusion that the defendant's confession was improperly admitted into evidence.[288] After the reversal, but before the retrial, the Supreme Court of the United States issued a decision that demonstrated that the confession was admissible as a matter of federal constitutional law.[289] The trial court refused a request by the State to reconsider the admissibility of the confession in light of the new precedent[290] and the State sought certiorari review.[291]

After noting concern about whether certain precedent might compel the conclusion that the confession would be inadmissible under the *Florida Constitution*, the court found that it was the law of the case that the confession was inadmissible.[292] The court pointed out that the Supreme Court of Florida could revisit the issue because appellate courts have "the power to reconsider and correct erroneous rulings notwithstanding that such rulings have become the law of the case."[293] The court therefore denied certiorari,[294] but provided an opportunity for the issue to be reopened by certifying a question of great public importance that asked whether the principles of the federal case were applicable in light of the precedent dealing with the question under the *Florida Constitution*.[295]

The law of the case doctrine was also applied in *White v. State*,[296] when a criminal defendant attempted to raise on a motion to correct an illegal sentence, an issue that had been previously raised in a direct appeal that had been decided without an opinion by a per curiam affirmance.[297] The Fifth District stated: "A per curiam decision even without opinion establishes the law of the case on the same issues and facts which were raised or which could have been raised."[298]

B. *Res Judicata*

In *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*,[299] which, for reasons which will soon become apparent, will hereinafter be

288. Owen v. State, 560 So. 2d 207 (Fla.), *cert. denied*, 498 U.S. 855 (1990).
289. *State v. Owen*, 654 So. 2d at 201.
290. *Id.*
291. *Id.*
292. *Id.* at 202.
293. *Id.* (quoting Preston v. State, 444 So. 2d 939, 942 (Fla. 1984)).
294. *State v. Owen*, 654 So. 2d at 201.
295. *Id.*
296. 651 So. 2d 726 (Fla. 5th Dist. Ct. App. 1995).
297. *Id.* at 726.
298. *Id.*
299. 643 So. 2d 16 (Fla. 1st Dist. Ct. App. 1994), *cert. denied*, 115 S. Ct. 1795 (1995).

referred to as *McKesson IV*, the court wrote the latest, and possibly final, chapter to a saga that began when two alcoholic beverage distributors, McKesson and Tampa Crown, separately challenged certain statutory provisions that provided for preferential tax treatment to distributors of alcoholic beverages made from products grown in Florida.[300]

In each case, the trial court entered a final and partial summary judgment invalidating the taxing scheme on Commerce Clause grounds, but made its ruling prospective in nature and thus denied each distributor's request for a tax refund.[301] In each case, the Division of Alcoholic Beverages and Tobacco appealed the Commerce Clause ruling and the distributor cross-appealed the prospective application ruling.[302] The First District consolidated the two appeals and certified the case to the Supreme Court of Florida,[303] which affirmed the trial court's rulings in *Division of Alcoholic Beverages and Tobacco v. McKesson Corp. ("McKesson I").*[304]

McKesson alone sought review in the Supreme Court of the United States, which, in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco ("McKesson II")*,[305] struck that portion of *McKesson I* which had granted only prospective relief.[306]

Following remand to the Supreme Court of Florida, the division announced a proposed remedy and the court, in *Division of Alcoholic Beverages & Tobacco v. McKesson Corp. ("McKesson III")*,[307] remanded the case to the trial court to determine whether the chosen remedy satisfied minimum constitutional requirements.[308]

Tampa Crown then filed a petition before the trial court seeking to appear in the proceeding.[309] The division opposed the petition, asserting, among other grounds, that because Tampa Crown had not pursued the case to the Supreme Court of the United States, *McKesson I* was res judicata insofar as Tampa Crown's claim for relief.[310] The trial court granted

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300. *Id.* at 18.
301. *Id.*
302. *Id.*
303. *Id.*
304. 524 So. 2d 1000 (Fla. 1988), *rev'd*, 496 U.S. 18 (1990), *on remand to* 574 So. 2d 114 (Fla. 1991), *on remand to* 643 So. 2d 16 (Fla. 1st Dist. Ct. App. 1994).
305. 496 U.S. 18 (1990).
306. *Id.* at 31.
307. 574 So. 2d 114 (Fla. 1991).
308. *McKesson IV*, 643 So. 2d at 18.
309. *Id.*
310. *Id.*

Tampa Crown's petition, and the First District was called upon to review the propriety of that ruling.[311]

The court concluded that because Tampa Crown did not seek review of the Supreme Court of Florida's decision in *McKesson I* in the Supreme Court of the United States, Tampa Crown "must be considered to have accepted that decision and, therefore, to have no interest in any remaining litigation."[312] Given that fact, the court found the decision in *McKesson I* to be res judicata as to Tampa Crown.[313]

The court rejected Tampa Crown's contention that it continued to have an interest in the case because United States Supreme Court Rule 12.4 provides that all parties to the proceeding in a lower court are deemed parties in the Supreme Court unless the petitioner notifies the clerk of the Supreme Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition.[314]

The court acknowledged that rule 12.4 offered "superficial support"[315] to Tampa Crown's position and that it had found no cases directly on point.[316] The court nonetheless concluded that Tampa Crown "was required to take some affirmative act before the United States Supreme Court,"[317] such as "filing either a notice informing the clerk of its continuing interest in the case or a brief adopting McKesson's brief"[318] for its refund request to survive.

XVII. MOOTNESS

Cases deemed moot by the appellate courts included the following:

James Mitchell & Co. v. Gallagher.[319] The court found that statements made by an individual, as the state insurance commissioner, could have served as the basis for the issuance of a writ of prohibition to disqualify him from issuing a final order, but went on to hold that the issue

311. *Id.*
312. *Id.* at 20.
313. *McKesson IV*, 643 So. 2d at 20.
314. *Id.* at 18-19.
315. *Id.* at 19.
316. *Id.*
317. *Id.*
318. *McKesson IV*, 643 So. 2d at 19.
319. 651 So. 2d 700 (Fla. 1st Dist. Ct. App.), *review denied*, 659 So. 2d 1087 (Fla. 1995).

was rendered moot by the fact that the individual involved no longer held that office.[320]

Future Medical Technologies International, Inc. v. Sanders.[321] A case seeking certiorari review of an order requiring production of information claimed to be privileged was deemed moot when the trial court stayed its order of production to allow for appellate review, but before such review was completed, the case went to trial without the information being provided.[322] The court found that by proceeding to trial without production, the respondent had waived the right to have the information produced.[323]

Metropolitan Dade County v. Knight.[324] An appeal from an order to a county to pay costs in a criminal case was considered moot, because the county had paid the costs at issue.[325]

XVIII. PER CURIAM AFFIRMANCE WITHOUT OPINION

In *Elliott v. Elliott*,[326] the court entered a per curiam affirmance without opinion.[327] The appellant's counsel filed a motion for rehearing that the court characterized as "rearguing the merits of the case in an effort to persuade the court to change its mind,"[328] and as "express[ing] displeasure with and chastis[ing] the lower court, the appellee and this court."[329] The court indicated that the tone and tenor of the motion was perhaps best reflected by the following language in the initial statement made by the appellant:

> After a Judgement (sic) that was a travesty; an Answer Brief filled with hyperbole and falsehood; and this Court's superficial and shallow review, the appellant can now only pray for simple fairness and equity.[330]

320. *Id.* at 701.
321. 651 So. 2d 250 (Fla. 4th Dist. Ct. App. 1995).
322. *Id.* at 250.
323. *Id.*
324. 640 So. 2d 90 (Fla. 3d Dist. Ct. App. 1994).
325. *Id.* at 90.
326. 648 So. 2d 135 (Fla. 4th Dist Ct. App. 1994).
327. *Id.* at 135.
328. *Id.*
329. *Id.*
330. *Id.*

Noting that Florida Rule of Appellate Procedure 9.330 commands that motions for rehearing not reargue the merits of the court's order,[331] the court found the motion to be "a personification of the very conduct found by the appellate courts to constitute a flagrant violation of the rule."[332] The court thus denied the motion for rehearing and ordered counsel to show cause why sanctions should not be imposed.[333]

In his response to the order to show cause, appellant's counsel expressed his apologies, and indicated that he intended no disrespect to the court, the lower court or opposing counsel.[334] The court indicated that "[h]ad counsel simply ended there (leaving well enough alone), the matter would have been adequately addressed and put to rest."[335] Counsel went on, however, "to explain what prompted his argumentative and overzealous motion for rehearing, namely, the fact that the court's opinion 'was a simple *per curiam* affirmance of the trial court's Final Judgment, and the undersigned attorney found it impossible to discern the Court's reasoning.'"[336] The response also stated that "'the undersigned attorney was extremely surprised at this Court's *per curiam* affirmance and presumed that his argument had been overlooked by this Court.'"[337]

The court found this to be "a most disturbing revelation,"[338] and stated: "The notion that an appellate practitioner would view a per curiam disposition, without opinion, as lacking in meaningful review is absolutely astounding."[339] The court opined that "[p]erhaps appellate counsel should not be faulted for this misconceived view of a per curiam affirmance, without opinion."[340] Rather, the court stated:

> Perhaps the fault lies with the law school curriculum, the continuing legal education programs offered by the Florida Bar, or by the appellate courts themselves, in not engendering a sense of confidence that the absence of a written opinion is not akin to a superficial treatment, and

331. *Elliot*, 648 So. 2d at 135.
332. *Id.* at 136.
333. *Id.*
334. Elliot v. Elliot, 648 So. 2d 137, 138 (Fla. 4th Dist. Ct. App. 1994).
335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.*
339. *Elliot II*, 648 So. 2d at 138.
340. *Id.*

> in leaving the bar with the unfounded notion that the court "did not read the briefs."[341]

"Perhaps," the opinion went on to say, "the court needs simply to restate the fundamental proposition that each and every appeal receives the same degree of attention and that a per curiam affirmance without opinion is not an indication of any kind of lesser treatment."[342] The court concluded its discussion by accepting counsel's apology and declining to impose sanctions.[343]

XIX. REHEARING

In *3299 N. Federal Highway, Inc. v. Board of County Commissioners*,[344] the Fourth District dealt with the issue of whether an opinion denying a motion for rehearing becomes effective immediately or whether there is some period of time provided for the filing of a second motion for rehearing or clarification.[345] The issue arose after the court entered an initial opinion and the appellants filed motions for rehearing. The court denied the motions in an opinion that certified a question of great public importance on the court's own motion and that corrected a factual error from the original opinion.[346] The second opinion "did not change the substance or effect" of the original opinion.[347]

The finality of the second opinion became an issue in two respects. First, two days after the second opinion was filed, arrests were made under the ordinance at issue in the case.[348] A stay of enforcement had precluded such arrests during the pendency of the case, but the initial opinion had vacated that stay.[349] Second, the appellants filed a motion for clarification directed to the second opinion.[350]

The court noted that Florida Rule of Appellate Procedure 9.330(b) allows a party to file just one motion for rehearing or for clarification of a

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341. *Id.*
342. *Id.* at 139.
343. *Id.*
344. 646 So. 2d 215 (Fla. 4th Dist. Ct. App. 1994).
345. *Id.* at 215.
346. *Id.* at 227-28.
347. *Id.* at 228.
348. *Id.*
349. *3299*, 646 So. 2d at 228.
350. *Id.*

decision,[351] and stated that "[a]n exception to the rule has been recognized where on the first motion for rehearing, the court changes its previous ruling."[352] The court found that since it did not change the result or reasoning of its initial opinion, the portion of the initial opinion vacating the stay became final and enforcement of the ordinance became appropriate.[353] The court did consider the motion for clarification, but only because the second opinion was erroneously rubber stamped by the clerk with a standard indication that the opinion was not final until the expiration of the time to seek rehearing or until the disposition of any such motion.[354] Clearly, the lesson of *3299* is that absent such a stamp, a motion for rehearing or clarification under similar circumstances would be inappropriate.

XX. ADMINISTRATIVE APPELLATE PRACTICE

A. *Review of Non-Final Administrative Orders*

In *Florida Leisure Acquisition Corp. v. Florida Commission on Human Relations*,[355] the appellant sought review of a non-final order rejecting a recommendation of a hearing officer who had concluded that the appellant had not engaged in a racially discriminatory employment practice.[356] The order in question remanded the matter to the hearing officer for a hearing on damages.[357] The court recognized that "jurisdiction lies in the district court to immediately review a non-final administrative order if review of the final agency action would not provide an adequate remedy."[358] It concluded, however, that the appellant in the case under consideration would not be deprived of an adequate remedy if appellate review was delayed until after the final order determining all issues.[359] The court stated: "The necessity of trying a case to conclusion before obtaining redress on appeal from an erroneous interlocutory ruling of the lower court does not make the remedy inadequate."[360]

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351. *Id.*

352. *Id.* at 228-29 (citing Dade Fed. Sav. & Loan v. Smith, 403 So. 2d 995, 999 (Fla. 1st Dist. Ct. App. 1981)).

353. *Id.* at 229.

354. *3299*, 646 So. 2d at 229.

355. 639 So. 2d 1028 (Fla. 5th Dist. Ct. App. 1994).

356. *Id.* at 1028.

357. *Id.*

358. *Id.* (citing FLA. CONST. art. V, § 4(b)(2); FLA. R. APP. P. 9.100(a),(c)); FLA. STAT. § 120.68(1) (1993).

359. *Id.* at 1029.

360. *Florida Leisure*, 639 So. 2d at 1029.

The court was not swayed by the fact that interlocutory appeals can be taken in civil cases from orders determining liability. The court pointed out that the supreme court interpreted such appeals as being specifically authorized by Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv), and that non-final administrative orders are not reviewable under that rule.[361]

B. *Exhaustion of Administrative Remedies*

In *Berkowitz v. City of Tamarac*,[362] the City sold to the appellant property on which it was operating some of its public works.[363] The property was leased back to the City until it could move the public works into a new facility, which was not yet completed.[364] The lease provided that the City would repurchase the property if, during the term of the lease, the City effectuated either an adverse change in zoning to the premises, the imposition of any additional governmental restrictions, or requirements which would prohibit or materially and adversely affect the appellant's intended development so that such development would become economically unfeasible.[365]

The appellant filed a complaint which alleged that the City adopted a comprehensive land use plan that contained restrictions that made his intended development economically unfeasible.[366] He sought money damages and rescission.[367] The trial court dismissed the case because the appellant had failed to exhaust his administrative remedies by not seeking relief from the restrictions.[368]

The Fourth District reversed, concluding that because the appellant was seeking money damages and rescission, which could not be obtained in an administrative proceeding, he was not required to exhaust administrative remedies.[369]

361. *Id.*
362. 654 So. 2d 982 (Fla. 4th Dist. Ct. App. 1995).
363. *Id.* at 982.
364. *Id.*
365. *Id.*
366. *Id.*
367. *Berkowitz*, 654 So. 2d at 982.
368. *Id.*
369. *Id.* at 983.

C. *Timeliness of Notice of Appeal*

In *Allen v. Live Oak Ford Mercury*,[370] the court rejected a claim that Florida Administrative Code Rule 38E-2.003(3), which states that appeals filed by mail shall be considered to have been filed when postmarked by the United States Postal Service, could be relied upon to breathe life into a case in which the notice of appeal that was mailed to the court was received after the expiration of the time within which an appeal could be instituted.[371]

The court stated: "The administrative rule to which the appellants refer concerns an administrative appeal in an unemployment compensation proceeding and [this] rule is clearly not applicable in appeals taken to this court."[372]

D. *Water Management District Emergency Orders*

In *West Coast Regional Water Supply Authority v. Southwest Florida Water Management District*,[373] the Fifth District found that it had no jurisdiction to review emergency orders of a water management district that were issued pursuant to the emergency powers authority of section 373.119(2) of the *Florida Statutes*. The court noted that under the statute, any person to whom an emergency order is directed is required to comply immediately, but may also obtain a hearing before the district's governing board "'as soon as possible.'"[374] The court held that only after the evidence adduced at such a hearing provides the record to support the emergency order or cause it to be quashed is the administrative action subject to review.[375]

XXI. WORKERS' COMPENSATION APPELLATE PRACTICE

A. *Appeals from Non-Final Orders Which Determine That a Party Is Not Entitled to Workers' Compensation Immunity as a Matter of Law*

In *Breakers Palm Beach, Inc. v. Gloger*,[376] the defendant appealed an order denying its motion for summary judgment which was grounded on

370. 647 So. 2d 1060 (Fla. 1st Dist. Ct. App. 1994).
371. *Id.* at 1060.
372. *Id.* at 1061.
373. 646 So. 2d 765 (Fla. 5th Dist. Ct. App. 1994).
374. *Id.* at 766.
375. *Id.*
376. 646 So. 2d 237 (Fla. 4th Dist. Ct. App. 1994).

workers' compensation immunity. The trial court had denied the motion because it concluded that there were issues of fact to be resolved.[377] The appeal was taken pursuant to the Florida Rule of Appellate Procedure 9.130(a)(3)(C)(vi), which permits appeals from non-final orders which determine "that a party is not entitled to workers' compensation immunity as a matter of law."[378]

The appellee moved to dismiss the appeal, arguing that the rule permits review only of orders determining once and for all that there is no workers' compensation immunity,[379] and does not permit review of orders merely determining, as did the order in the case, that the issue of workers' compensation immunity is an issue of fact.[380]

The Fourth District employed a grammatical analysis in denying the motion to dismiss. It found that if the words "as a matter of law" had been placed at the beginning of the above-cited rule provision, the appellee's argument would have been persuasive.[381] Under that scenario, the court concluded, the rule would permit review of non-final orders which determine "'as a matter of law that a party is not entitled to workers' compensation immunity.'"[382] The words "'as a matter of law,'" the court continued, would modify "'determine.'"[383] Since the key words were placed at the end of the rule provision, however, the court found that they modified the word "entitled" and that the provision therefore had a broader meaning.[384] That meaning, the court determined, encompassed the order under review.[385]

B. *Emergency Matters*

In *Bradley v. Hurricane Restaurant*,[386] an appeal was taken from an order of a judge of compensation claims granting in part and denying in part a claim for benefits found to involve an emergency.[387] The appellees moved to dismiss, asserting that the order was not a non-final order that can

377. *Id.* at 238.
378. FLA. R. APP. P. 9.130(a)(3)(C)(vi).
379. *Id.*
380. *Id.*
381. *Breakers*, 646 So. 2d at 237-38.
382. *Id.*
383. *Id.* at 237.
384. *Id.* at 238.
385. *Id.*
386. 652 So. 2d 443 (Fla. 1st Dist. Ct. App. 1995).
387. *Id.* at 443.

be appealed under Florida Rule of Workers' Compensation Procedure 4.160, and that the order was not appealable as a final order because a claim for post-surgical attendant care alleged in the original claim remained pending and undisposed of by the appealed order.[388]

The court pointed to the fact that section 440.25(4)(h), *Florida Statutes*, as amended by the legislature in its 1993 special session, provides that a judge of compensation claims may have an "emergency conference when there is a 'bona fide emergency involving the health, safety, or welfare of an employee,'" and that "[a]n emergency conference . . . may result in the entry of an order or the rendering of an adjudication by the judge of compensation claims."[389] Given the "direct and unambiguous language"[390] of this statutory provision, and the fact that the judge of compensation claims found a bona fide emergency to exist, the court concluded that the order under review was "a final order subject to appellate review in this court."[391]

C. *Orders Taxing Costs*

In *Employer's Overload of Dade County v. Robinson*,[392] the court dismissed an appeal from an order taxing costs, but reserved jurisdiction to determine entitlement to attorney's fees. The court stated: "As long as any other matter is pending before a judge of compensation claims, an order taxing costs is not reviewable, unless appealed as part of an adjudication on the merits."[393] In dismissing the case, however, the court noted that it did not "in any way depart from the rule that a judge of compensation claims may, in an order adjudicating the merits of a claim for benefits, reserve jurisdiction to award attorney's fees, without affecting the finality of the order adjudicating the merits (which may include an award of costs)."[394]

388. *Id.*
389. *Id.* at 444 (quoting FLA. STAT. § 440.25(4)(h) (Supp. 1994)).
390. *Id.*
391. *Bradley*, 652 So. 2d at 444.
392. 642 So. 2d 72 (Fla. 1st Dist. Ct. App. 1994).
393. *Id.* at 73.
394. *Id.*

XXII. CRIMINAL APPELLATE PRACTICE

A. *Custody during State Appeal of Order of Dismissal*

In *Fontana v. Rice*,[395] the supreme court dealt with a certified question that asked whether a trial court is authorized, upon a showing of good cause, to continue a defendant on bond pending a state appeal from an order dismissing criminal charges, or whether such a defendant must be released on recognizance.[396] The court held that defendants must be discharged from custody when a trial court has dismissed all criminal charges and no new indictment or information is filed against the defendant.[397] The court stated that this rule applies even if the State appeals the dismissal unless some other charge justifies a continuation of custody.[398]

The court found the issue to be controlled by Florida Rule of Criminal Procedure 3.190(e), which states in pertinent part:

> If the motion to dismiss is sustained, the court may order that the defendant be held in custody or admitted to bail for a reasonable specified time pending the filing of a new indictment or information. If a new indictment or information is not filed within the time specified in the order, or within such additional time as the court may allow for good cause shown, the defendant, if in custody, shall be discharged therefrom, unless some other charge justifies a continuation in custody.[399]

B. *Self-Representation on Appeal in Capital Cases*

In *Hill v. State*,[400] the public defender was appointed to represent the defendant on the appeal of his conviction for first-degree murder and sentence of death.[401] The defendant moved for leave to discharge the public defender and to represent himself on appeal.[402] Pursuant to appointment by the supreme court, a circuit judge conducted a hearing on the motion and determined that the defendant comprehended his constitutional right to assistance of counsel in the appeal process and that he

395. 644 So. 2d 502 (Fla. 1994).
396. *Id.* at 502.
397. *Id.* at 503.
398. *Id.*
399. FLA. R. CRIM. P. 3.190(e).
400. 656 So. 2d 1271 (Fla. 1995).
401. *Id.* at 1272.
402. *Id.*

knowingly and voluntarily waived that right.[403] The circuit judge recommended that the defendant be allowed to represent himself, but that the public defender continue in the case as "'next friend of the court.'"[404]

The supreme court noted that the right to self-representation at trial, as recognized by *Faretta v. California*,[405] is not applicable to appeals.[406] The court pointed to the fact that the case was a capital appeal and indicated that it was "concerned that it cannot properly carry out its statutory responsibility to review Hill's conviction and sentence of death without the skilled adversarial assistance of a lawyer acting on Hill's behalf, particularly as it concerns the sufficiency of the evidence to convict and the proportionality of the death sentence."[407] Accordingly, the court denied the appellant's motion but stated that because the case was a capital case, it would allow the appellant to file a pro se supplemental brief.[408]

C. *Death of Defendant during Pendency of Appeal*

In *Clements v. State*,[409] the defendant's criminal conviction was affirmed.[410] Prior to the expiration of the time for filing a motion for rehearing, the defendant's counsel filed a motion for abatement of the appeal ab initio on the ground that the defendant had died.[411] A subsequently filed death certificate indicated that the defendant was found dead on a date subsequent to the affirmance and prior to the filing of the motion.[412]

The State responded to the motion, acknowledging the line of cases entitling the defendant to the relief requested,[413] but representing that the supreme court, in a recent case presenting similar circumstances, *Rodriguez v. State*,[414] denied a motion to abate an appeal ab initio and instead dismissed the appeal.[415] The court in *Clements* did abate the appeal ab

403. *Id.*
404. *Id.*
405. 422 U.S. 806 (1975).
406. *Hill*, 656 So. 2d at 1272.
407. *Id.*
408. *Id.*
409. 652 So. 2d 1294 (Fla. 1st Dist. Ct. App. 1995).
410. *Id.* at 1295.
411. *Id.*
412. *Id.*
413. *Id. See, e.g.*, Williams v. State, 648 So. 2d 313 (Fla. 1st Dist. Ct. App. 1995); Bagley v. State, 122 So. 2d 789 (Fla. 1st Dist. Ct. App. 1960).
414. 645 So. 2d 454 (Fla. 1994).
415. *Clements*, 652 So. 2d at 1295.

initio,[416] but it went on to certify to the supreme court the following question as one of great public importance:

> DOES THE DEATH OF A CRIMINAL DEFENDANT AFTER JUDGMENT AND SENTENCE, BUT DURING THE PENDENCY OF THE APPEAL THEREFROM, REQUIRE THE PROSECUTION TO BE PERMANENTLY ABATED AB INITIO IN THE TRIAL AND APPELLATE COURTS?[417]

The court also certified the same question in *Thomas v. State*,[418] a case in which it appears that the defendant died prior to the court reaching a determination of the case.

D. *Absence of Defendant*

In *Jarrett v. State*,[419] the defendant failed to appear for a pretrial conference and a capias for his arrest was issued.[420] Several days later, with the defendant still missing, a jury was selected and sworn and the case proceeded to trial in the absence of the defendant.[421] After a conviction on one of two charges, the defendant's counsel filed a motion for a new trial.[422] While the motion was pending, the defendant was apprehended.[423]

After the motion was denied, an appeal followed and the First District addressed the issue of whether it should decide the case. The court found that unlike a situation in which an escape is from restraint after a conviction, the defendant's absence "did not delay judgment, sentence, or time for appeal."[424] The court thus concluded that the escape did not burden the court system in a manner that would justify dismissal.[425]

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416. *Id.*
417. *Id.*
418. 654 So. 2d 635 (Fla. 1st Dist. Ct. App. 1995).
419. 654 So. 2d 973 (Fla. 1st Dist. Ct. App. 1995).
420. *Id.* at 973.
421. *Id.*
422. *Id.* at 973-74.
423. *Id.* at 974.
424. *Jarrett*, 654 So. 2d at 974.
425. *Id.*

E. *Appeals from Rulings on Motions to Correct Illegal Sentences*

In *Wright v. State*,[426] the Fourth District dismissed an appeal as untimely, applying a well-settled line of precedent[427] concluding that the pendency of a motion for rehearing does not toll the time for appealing from a trial court's ruling on a motion filed under Florida Rule of Criminal Procedure 3.800(a) for correction of an illegal sentence.[428]

Judge Farmer wrote a specially concurring opinion. He noted that he concurred because he was bound to do so by stare decisis, but stated that if he "were writing on a clean slate in this court," he did not think he would join in a dismissal of the case.[429] Judge Farmer pointed out that rule 3.800(a) is unique in that it allows a court "to correct an illegal sentence *at any time*," and that its purpose is to provide any convicted person who "is suffering under a sentence that is illegal" to have a "ready, expeditious and effective tool at hand to test the illegality."[430] He then stated, "I do not understand why the circuit court's denial of rehearing should not be treated as itself an order denying relief from an illegal sentence, which is fully appealable to us if the notice of appeal is filed, as here, within 30 days of the court's order."[431]

Judge Farmer went on to indicate that he did not believe that the court "should shrink from considering whether a sentence may be illegal merely because the prisoner made two attempts to persuade the trial judge, one of them by motion for rehearing."[432] "The alternative," he said, "is for the prisoner to continue serving a putatively illegal sentence while being barred from having appellate review of the trial court's decision to deny such relief."[433] Judge Farmer concluded his thoughts by stating, "This alternative is so directly antagonistic to the plain meaning and purpose of rule 3.800(a) that I cannot believe this is what the drafters truly intended."[434]

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426. 643 So. 2d 1157 (Fla. 4th Dist. Ct. App. 1994).

427. *See* Campbell v. State, 637 So. 2d 80 (Fla. 4th Dist. Ct. App. 1994); Jones v. State, 635 So. 2d 989 (Fla. 1st Dist. Ct. App. 1994); Newman v. State, 610 So. 2d 455 (Fla. 4th Dist. Ct. App. 1992).

428. *Wright*, 643 So. 2d at 1157.

429. *Id.* at 1157 (Farmer, J., concurring specially).

430. *Id.* at 1158 (footnote omitted).

431. *Wright*, 643 So. 2d at 1158 (Farmer, J., concurring specially) (footnote omitted).

432. *Id.*

433. *Id.* at 1158-59.

434. *Id.* at 1159 (footnote omitted).

F. *Special Assistant Public Defenders*

Several cases addressed the issue of whether special assistant appellate public defenders would be required to provide their clients with the records and transcripts from their cases at the conclusion of their appeals.

In *Pearce v. Sheffey*,[435] the Second District reaffirmed the conclusion it reached in *Thompson v. Unterberger*,[436] that "an indigent defendant is entitled to possession of a transcript which was provided at public expense to his court-appointed counsel, without being required to pay for photocopying the transcript."[437]

The Third District, in *Coates v. McWilliams*,[438] however, refused to require a special assistant public defender to furnish his client with copies of requested documents. The court pointed to the fact that no funds were provided to reimburse the attorney for the cost of duplicating and forwarding the copies to the client[439] and the fact the attorney was required by an administrative order to maintain the original documents for a period of three years from the closing of the case.[440] The court stated, "[b]y accepting an appointment as special assistant public defender, counsel does not become obligated to bear the cost of furnishing documents to an indigent defendant, even though a duly constituted public defender's office, which is properly funded for such cost items, may be so required."[441]

The Third District did require a special assistant public defender to furnish his client with documents and transcripts in *Beaubrum v. Rolle*.[442] There, despite the court's request, the attorney failed to respond to the client's petition for a writ of mandamus, which sought production of the items.[443] The court noted the failure to respond and stated that "it appears that there is no impediment in granting the relief sought."[444]

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435. 647 So. 2d 333 (Fla. 2d Dist. Ct. App. 1994).
436. 577 So. 2d 684 (Fla. 2d Dist. Ct. App. 1991).
437. *Pearce*, 647 So. 2d at 333.
438. 650 So. 2d 695 (Fla. 3d Dist. Ct. App. 1995).
439. *Id.* at 695.
440. *Id.* at 696.
441. *Id.*
442. 654 So. 2d 560 (Fla. 3d Dist. Ct. App. 1994).
443. *Id.* at 560.
444. *Id.*

G. *Attorney's Fees and Costs in Criminal Cases*

1. Attorney's Fees

In *Zelman v. Metropolitan Dade County*,[445] the Third District addressed the issue of what hourly fee should be paid to an attorney for his successful court-appointed representation of a defendant in a capital appeal.[446] The court had previously quashed an initial award upon a holding, in part, that the hourly rate was not limited to the $40 per hour for out-of-court services and $50 per hour for in-court services established by a trial court administrative order.[447] After a hearing for the purpose of establishing a reasonable hourly rate, the trial court fixed the rate at the same level, $40 per hour for out-of-court services and $50 per hour for in-court services.[448] The Third District also quashed this order, remanding for a new hearing to set a reasonable rate using the factors contained in Rule of Professional Conduct 4-1.5.[449] That hearing resulted in an identical award.[450]

On review of that order, the Third District concluded that based upon the record and the court's own expertise, it was apparent that the award was "not close to a reasonable fee for the difficult and uncommonly burdensome services Zelman performed so well."[451] The court went on to say: "In view of the prior unfortunate history of this case, in which we seem to have been so unsuccessful in making ourselves understood, we decline to require still another hearing on the issue in the court below."[452] Rather, the court determined that the attorney would be awarded $100 per hour for out-of-court services and $125 per hour for in-court services rendered.[453]

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445. 645 So. 2d 57 (Fla. 3d Dist. Ct. App. 1994).

446. The appeal had resulted in the reversal of the defendant's two first-degree murder convictions and the vacation of his two death sentences. Garcia v. State, 564 So. 2d 124 (Fla. 1990).

447. Zelman v. Metropolitan Dade County, 586 So. 2d 1286 (Fla. 3d Dist. Ct. App. 1991), *appeal after remand*, 622 So. 2d 6 (Fla. 3d Dist. Ct. App. 1993), *appeal after remand*, 645 So. 2d 57 (Fla. 3d Dist. Ct. App. 1994).

448. *Zelman*, 645 So. 2d at 57.

449. *Id.*

450. *Id.* at 57-58.

451. *Id.* at 58.

452. *Id.*

453. *Zelman*, 645 So. 2d at 58.

2. Costs

In a series of cases, the Fourth District found that it was improper to include, either as a provision in a judgment of conviction, or as a condition of probation, the prospective imposition of appellate costs.[454] As noted by the court in *Anderson v. State*,[455] such costs "may be taxed in favor of the prevailing party, pursuant to Florida Rule of Appellate Procedure 9.400(a), which 'explicitly provides for taxation of costs by the lower tribunal on motions heard within 30 days *after* issuance of the mandate—but not before.'"[456]

H. *Transcripts in Criminal Cases*

In *Brown v. State*,[457] following the procedure set forth in Florida Rule of Appellate Procedure 9.200(b)(2), the appellant's attorney served a photocopy of the certified trial transcript on the office of the Attorney General.[458] The Attorney General's office refused to accept the uncertified photocopy, explaining in a letter that it would not accept any transcript unless it was prepared and certified by an official court reporter because doing so would place upon that office the burden of checking the photocopy pages against a certified copy filed with the appellate court.[459] The Attorney General relied upon Florida Rule of Appellate Procedure 9.140(d), which states that in criminal cases the clerk of the lower court shall provide the trial transcript and the record on appeal to the Attorney General.[460]

The Fifth District found that rule 9.200(b)(2), which set forth the procedure utilized by the appellant's counsel, "is applicable to criminal appeals only to the extent that it does not conflict with rule 9.140(d),"[461] the rule relied upon by the Attorney General. Therefore, the court found that the procedure employed by the appellant's counsel could not be used

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454. *See* McDonald v. State, 649 So. 2d 943 (Fla. 4th Dist. Ct. App. 1995); Davis v. State, 641 So. 2d 972 (Fla. 4th Dist. Ct. App. 1994); Anderson v. State, 632 So. 2d 132 (Fla. 4th Dist. Ct. App. 1994).

455. 632 So. 2d at 132.

456. *Id.* at 133 (quoting Boyer v. Boyer, 588 So. 2d 615, 617 (Fla. 5th Dist. Ct. App. 1991), *review denied*, 599 So. 2d 654 (Fla. 1992)).

457. 639 So. 2d 634 (Fla. 5th Dist. Ct. App. 1994).

458. *Id.* at 634-35.

459. *Id.* at 635.

460. *Id.* In pertinent part, the rule states, "The clerk shall retain the original of the record and shall forthwith transmit copies thereof to the court, to the attorney general, and to the office of a public defender appointed to represent an indigent defendant." FLA. R. APP. P. 9.140(d).

461. *Brown*, 639 So. 2d at 635.

in criminal cases and held "that appellants in criminal cases must file a certified copy of the trial transcript with the clerk of the lower court for transmittal to the office of the Attorney General."[462]

I. *Belated Appeals in Criminal Cases*

1. Procedure for Obtaining Belated Appeals

In *Stephenson v. State*,[463] the supreme court declined an invitation to change the procedure it established in *State v. District Court of Appeal, First District*[464] for obtaining a belated appeal. In *District Court of Appeal*, the court had concluded that a claim for a belated appeal based on ineffective assistance of trial counsel for failing to file a timely notice of appeal must be raised in the trial court in a motion filed pursuant to Florida Rule of Criminal Procedure 3.850.[465] In *Stephenson*, the court addressed the certified question of whether the district courts of appeal have the authority to grant belated appeals when the record on appeal indisputably reflects that trial counsel, through neglect, inadvertence or error, filed an untimely notice of appeal and thus rendered ineffective assistance as a matter of law.[466]

The question arose in a case in which the Second District dismissed an appeal as untimely, but directed the trial court to grant a belated appeal if one was sought by a legally sufficient motion.[467] The court found it "incongruous for us to dismiss Stephenson's direct appeal while at the same time providing him with the remedy of a belated appeal, thereby delaying a review of the merits of his case at the expense of judicial economy."[468] Nonetheless, the court recognized that it was not at liberty to cast aside the process established by *District Court of Appeal*.[469] The court indicated that it would prefer to "dispense with the cumbersome procedure we have fashioned, treat the notice of appeal as a petition for writ of habeas corpus, and grant Stephenson belated review of the merits of his appeal."[470]

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462. *Id.*
463. 655 So. 2d 86 (Fla. 1995).
464. 569 So. 2d 439 (Fla. 1990).
465. *Id.* at 442.
466. 655 So. 2d at 86.
467. Stephenson v. State, 640 So. 2d 117, 118 (Fla. 2d Dist. Ct. App. 1994), *aff'd*, 655 So. 2d 86 (Fla. 1995).
468. *Id.*
469. *Id.* at 119.
470. *Id.*

After discussing the proceedings in the lower courts and its decision in *District Court of Appeal*, the Supreme Court of Florida, in approving the Second District's decision, concluded that the district courts of appeal do not have the authority to grant belated appeals resulting from ineffective assistance of trial counsel.[471] The court did give some indication that it might be willing to revisit this question at some point in the future. The court stated that "[f]or now,"[472] it was adhering to the principle established in *District Court of Appeal*, and noted that the issue was "currently under review by this Court and the Committee on Rules of Appellate Procedure."[473]

The decision in *Stephenson* does not appear to have any effect on that portion of *District Court of Appeal* which indicates that claims of ineffective assistance of appellate counsel should be raised by petition for writ of habeas corpus filed in the appellate court.[474]

2. Due Process and Right to Counsel

In *Moment v. State*,[475] the Fourth District, in one opinion, both granted a belated appeal and reversed the order belatedly reviewed. The case involved a situation in which, at a hearing on the defendant's motion for post-conviction relief, filed about a month after sentencing, the trial court ordered the defendant to pay $12,800 in restitution.[476] The appellate court found several problems with the proceedings at the trial level. The defendant was not given notice of the hearing. [477] The defendant was not represented by counsel at the hearing.[478] No evidence was presented as to restitution, the trial court relying instead on the prosecutor's statement that she had received a phone call from the victim telling her the amount of damages.[479] Finally, the defendant was not informed of his right to appeal.[480]

The defendant did not appeal from the restitution order. Instead, he moved to vacate restitution and appealed from the order denying that

471. *Stephenson*, 655 So. 2d at 87.
472. *Id.*
473. *Id.* at 87 n.1.
474. 569 So. 2d at 442 n.1.
475. 645 So. 2d 502 (Fla. 4th Dist. Ct. App. 1994).
476. *Id.* at 503.
477. *Id.*
478. *Id.*
479. *Id.*
480. *Moment*, 645 So. 2d at 503.

motion.[481] The State argued that all of the defects could have and should have been raised in a direct appeal from the order of restitution.[482] The court found that "because this case is so fundamentally and thoroughly flawed in its most basic constitutional guarantees of due process and right to counsel, we consider this an exceptional case and treat this as a petition for a belated appeal of the restitution order, which we grant."[483]

3. Belated Institution of a Belated Appeal

In *Lofton v. State*,[484] the trial court granted the defendant's motion for post-conviction relief that sought a belated appeal, and appointed a public defender to pursue the appeal.[485] Inexplicably, the appeal was not instituted until twenty months after the entry of the trial court's order.[486] Noting that under *Mack v. State*,[487] a belated appeal must be instituted by the filing of a notice of appeal within thirty days of rendition of the order allowing the proceeding, the Fifth District dismissed the appeal.[488] The court concluded that the defendant would have to return to the trial court with another motion for post-conviction relief, showing, if he could, that the last delay was due to a legally cognizable excuse, such as ineffective assistance of counsel, for failing to pursue the belated appeal.[489]

4. Other Cases

In *Love v. State*,[490] the First District concluded that a defendant was not precluded from obtaining a belated appeal by the fact that he had pled guilty.[491]

In *Nava v. State*,[492] the Fourth District found that in the absence of specific prejudice, the doctrine of laches does not bar a claim of entitlement to a belated appeal.[493]

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481. *Id.*
482. *Id.*
483. *Id.*
484. 639 So. 2d 1134 (Fla. 5th Dist. Ct. App. 1994).
485. *Id.* at 1134.
486. *Id.*
487. 586 So. 2d 1266 (Fla. 1st Dist. Ct. App. 1991).
488. *Lofton*, 639 So. 2d at 1134.
489. *Id.*
490. 638 So. 2d 1062 (Fla. 1st Dist. Ct. App. 1994).
491. *Id.* at 1063.
492. 652 So. 2d 1264 (Fla. 4th Dist. Ct. App. 1995).
493. *Id.* at 1265.

In *Keller v. State*,[494] the Fifth District granted a belated appeal to a defendant who had already had an unsuccessful pro se appeal. The defendant had requested counsel for his initial appeal and had been found insolvent for purposes of appeal at that time.[495] Despite that fact, no appointment was made and the defendant consequently instituted his own appeal and filed a brief, in which he again requested counsel. Categorizing the defendant's efforts as "a futile attempt to muster an effective appeal," the court found that a belated appeal was appropriate.[496]

J. *Review of Orders Waiving Juvenile Jurisdiction*

In *State v. Del Rey*,[497] the State appealed from, and sought certiorari review of, a non-final order waiving juvenile jurisdiction over the respondent and authorizing the State to prosecute the respondent as an adult.[498] The challenged portion of the order: 1) reduced the three filed charges of manslaughter by culpable negligence with a weapon to manslaughter by culpable negligence, and 2) precluded the State from filing an information charging the respondent as an adult with an offense other than the offenses on which the court waived juvenile jurisdiction or any lesser included offenses thereof.[499]

The Third District dismissed the appeal, finding that "[t]here is no Florida Supreme Court rule of procedure which authorizes the State to appeal from a non-final order in a juvenile delinquency case, as here, and, accordingly, this court has no jurisdiction to entertain the State's appeal."[500]

The court also dismissed the certiorari proceeding, finding that, under the facts of the case, the State had failed to establish irreparable injury.[501] The court noted that despite the existence of the challenged order, the State had filed an information charging the respondent as an adult with three counts of manslaughter by culpable negligence with a weapon and that the respondent had moved to dismiss those counts.[502] The court reasoned that, if the circuit court denied the motion to dismiss, the issue would become

494. 652 So. 2d 1278 (Fla. 5th Dist. Ct. App. 1995).
495. *Id.* at 1278.
496. *Id.*
497. 643 So. 2d 1146 (Fla. 3d Dist. Ct. App. 1994).
498. *Id.* at 1147.
499. *Id.*
500. *Id.*
501. *Id.* at 1148.
502. *Del Rey*, 643 So. 2d at 1148.

moot, and that if the circuit court granted the motion, the State would have the right to appeal from that order pursuant to Florida Rule of Appellate Procedure 9.140(c)(1)(A).[503]

K. *Orders Reviewable in Criminal Cases*

Numerous cases dealt with the question of whether certain orders were reviewable and, if so, what type of proceeding was appropriate. These cases included:

State v. Lewek.[504] An order severing charges is neither appealable nor an appropriate subject for certiorari.[505]

State v. Riley.[506] A sentence within the guidelines is not illegal even if the trial court commits error by refusing to make habitual offender findings on timely request by the State.[507] Such a sentence therefore cannot be appealed,[508] nor can the State obtain relief by mandamus or certiorari.[509]

Kolker v. State.[510] "Certiorari is the appropriate means by which to seek review of an order disqualifying a defendant's attorney."[511]

State v. Fudge.[512] The State may not appeal from a directed verdict of acquittal as to a particular charge when the directed verdict is entered after a jury deadlock on the charge.[513] Because of the deadlock, there is no verdict, and section 924.07(1)(j) of the *Florida Statutes*, which allows the State to appeal from a ruling granting a motion for judgment of acquittal after a jury verdict, does not apply.[514]

State v. Bradford.[515] Certiorari is appropriate to review a trial court's order excluding testimony as to the victim's state of mind before her murder

503. *Id.*
504. 656 So. 2d 268 (Fla. 4th Dist. Ct. App. 1995).
505. *Id.* at 269.
506. 648 So. 2d 825 (Fla. 3d Dist. Ct. App. 1995).
507. *Id.* at 826.
508. *Id.*
509. *Id.* at 826-27.
510. 649 So. 2d 250 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 658 So. 2d 991 (Fla. 1995).
511. *Id.* at 251 n.1.
512. 645 So. 2d 23 (Fla. 2d Dist. Ct. App. 1994).
513. *Id.* at 24.
514. *Id. See* FLA. STAT. § 924.07(1)(j) (1993).
515. 658 So. 2d 572 (Fla. 5th Dist. Ct. App. 1995).

when the evidence is "crucial evidence" and thus, "there would be a miscarriage of justice"[516] if the evidence is not admissible.

XXIII. FAMILY LAW APPELLATE PRACTICE

A. *Belated Appeals from Orders Terminating Parental Rights*

In *T.D. v. Department of Health & Rehabilitative Services*,[517] the First District discussed the procedure to be used in obtaining belated appeals from orders terminating parental rights.[518] When the case first reached the appellate court, it was dismissed because the notice of appeal was not timely filed.[519] The dismissal was without prejudice to the appellant's right to file a petition for writ of habeas corpus in the trial court pursuant to the procedure outlined by the supreme court in *In the interest of E.H.*[520] In *E.H.*, the supreme court had concluded that when there is a claim that an attorney's error precluded a parent from appealing an order terminating parental rights, the parent, in a petition for writ of habeas corpus in the trial court, may seek a belated appeal.[521]

Subsequent to the First District's dismissal in *In the interest of T.D.*, a petition for writ of habeas corpus was filed in the trial court. The petition, however, was directed to the merits of the termination order containing a brief explanation of the circumstances which occasioned the late filing of the notice of appeal.[522] The order denying the petition set forth no findings relating to the question of whether a belated appeal was appropriate, but was instead a reaffirmation of the merits of the order terminating parental rights.[523]

On appeal from that order, the First District pointed out that "the trial court and respective counsel misconstrued the remedy authorized by the supreme court in *E.H.*"[524] That remedy, the court stated, "is analogous to that available to a defendant in a criminal proceeding to seek a belated appeal predicated on ineffective assistance of counsel."[525]

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516. *Id.* at 574.
517. 639 So. 2d 704 (Fla. 1st Dist. Ct. App. 1994).
518. *Id.* at 705.
519. In the interest of T.D., 623 So. 2d 851 (Fla. 1st Dist. Ct. App. 1993).
520. *Id.* at 852-53. *See* In the interest of E.H., 609 So. 2d 1289 (Fla. 1992).
521. *E.H.*, 609 So. 2d at 1290-91.
522. *T.D.*, 639 So. 2d at 705.
523. *Id.*
524. *Id.*
525. *Id.* n.1.

Accordingly, the court reversed and remanded the cause with directions to the appellant to file a petition setting forth the grounds which demonstrate the entitlement to a belated appeal.[526] The court further stated that the "trial court's order should set forth such findings of fact as are necessary to support the grant or denial of a belated appeal."[527]

B. *Premature Appeals*

In *State, Department of Health & Rehabilitative Services v. Skinner*,[528] the trial court entered three orders limiting the amount of retroactive child support collectible in three proceedings in which the Department of Health & Rehabilitative Services and the mothers sought a determination of paternity and child support.[529] The court determined that the orders were non-final and not subject to review, and stated that in similar situations, it would normally dismiss the appeals.[530] The court indicated, however, that it had discovered that while the appeals were pending, final orders had been entered in the cases and that the time for appealing from those orders had expired.[531] Noting that if it dismissed the appeals, the department and the mothers would lose all chance for review, the court treated the notices of appeal as premature appeals of the final orders,[532] and considered the merits of the case.

C. *Contempt for Failing to Pay Child Support*

In *Rodriguez v. Rodriguez*,[533] the appellant was found in contempt of court for failing to meet his child support obligations. He then failed to either pay the purge amount established by the court or to surrender himself to serve the alternative sentence imposed by the court.[534] On appeal from the contempt order, the Third District pointed out that when an "appellant has disobeyed an order of the trial court, the appellate court may, in its discretion, either entertain or dismiss an appeal."[535] The court noted that although an appellate court should ordinarily provide a grace period prior

526. *Id.*
527. *T.D.*, 639 So. 2d at 705.
528. 649 So. 2d 280 (Fla. 2d Dist. Ct. App. 1995).
529. *Id.* at 281.
530. *Id.* at 282.
531. *Id.*
532. *Id.*
533. 640 So. 2d 133 (Fla. 3d Dist. Ct. App. 1994).
534. *Id.* at 134.
535. *Id.* (quoting Gazil v. Gazil, 343 So. 2d 595, 597 (Fla. 1977)).

to dismissing the appeal within which the appellant may comply with the violated order and prevent dismissal, such a grace period is not necessary when the appellant has absconded from the court's jurisdiction.[536] Since the appellant in *Rodriguez* had failed to surrender himself, the court applied this principle and dismissed the appeal.[537]

XXIV. SANCTIONS

A. *Parties*

In *Lowery v. Kaplan*,[538] the Fourth District dealt with a pro se petitioner who was proceeding in forma pauperis.[539] The petitioner had filed twenty-eight petitions for extraordinary relief and twenty-one final and non-final appeals within the preceding three years.[540] None had met with success.[541] Noting that it has the "inherent authority to prevent abuse of the judicial system,"[542] the court dismissed the pending petition as a sanction for abusive filings[543] and ordered the prospective denial of in forma pauperis status for the petitioner's future petitions unless they are presented by a member of The Florida Bar who represents the petitioner.[544]

The Fourth District imposed similar sanctions in *Martin v. Marko*.[545] There, as in *Lowery*,[546] the court acted on its inherent authority.[547] It noted, however, that the Supreme Court of the United States had adopted a specific rule authorizing the denial of a motion for leave to proceed in forma pauperis when the Court is satisfied that a case is "frivolous or malicious."[548] The court went on to suggest that "[a]lthough Florida does not presently have a similar rule, it would be prudent for our supreme court to consider adopting a similar provision."[549]

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536. *Id.*
537. *Id.*
538. 650 So. 2d 114 (Fla. 4th Dist. Ct. App. 1995).
539. *Id.* at 114.
540. *Id.*
541. *Id.*
542. *Id.* at 115.
543. *Lowery*, 650 So. 2d at 116.
544. *Id.*
545. 651 So. 2d 819 (Fla. 4th Dist. Ct. App. 1995).
546. 650 So. 2d at 114.
547. *Martin*, 651 So. 2d at 820.
548. *Id.* (quoting U.S. SUP. CT. R. 39.8).
549. *Id.*

In *Isley v. State*,[550] the Fifth District indicated its frustration with a petitioner who had come before the court nine times since 1990, when the court affirmed his conviction and sentence for second degree murder. Judge Sharp's opinion begins with the following statement: "This case reminds me of my grandmother's final warning and admonition to me and my siblings as children, when we had exhausted her patience with our doings. 'Enough is enough,' she would say. And that was the end of it."[551]

The opinion goes on to prohibit the petitioner from filing any further pro se pleadings with the court concerning the conviction and sentence in question, and concludes by echoing the words of Judge Sharp's grandmother: "Enough is enough."[552]

In *Scott v. State*,[553] a case described by the Fifth District as "another successive and repetitive proceeding," the court stopped short of imposing the sanction it imposed in *Isley*, but warned that the appellant was "approaching an abuse of process and an exhaustion of this court's patience."[554]

Likewise, in *Skinner v. State*,[555] a per curiam affirmance without opinion, Judge Sharp wrote a specially concurring opinion to state her belief that while the petition for habeas corpus filed by the petitioner lacked substantive merit, the primary reason why it should be denied was that it constituted "an abuse of process."[556] She noted that the petitioner's claims could have been raised in a previous petition he had filed, and that the petitioner had made no showing that the second set of claims were not known or could not have been discovered when the first petition was filed.[557] Writing in the hope to "forestall such petitions Skinner may contemplate filing in the future," she stated that the failure to make such a showing made the second petition, "and any future ones similarly drafted, an abuse of process."[558]

550. 652 So. 2d 409 (Fla. 5th Dist. Ct. App. 1995).
551. *Id.* at 410.
552. *Id.* at 441.
553. 656 So. 2d 204 (Fla. 5th Dist. Ct. App. 1995).
554. *Id.* at 204.
555. 656 So. 2d 282 (Fla. 5th Dist. Ct. App. 1995).
556. *Id.* at 282.
557. *Id.*
558. *Id.*

B. *Attorneys*

In *Keene v. Nudera*,[559] a petition requesting certiorari review was filed with the Second District, and neither a filing fee nor an order of indigency accompanied the petition.[560] The court gave the petitioner's counsel an opportunity to prove his client's indigency status, but counsel failed to either obtain an order from the trial court or to file a sufficient motion and affidavit with the district court.[561] The court noted that on at least ten occasions in the preceding twenty-five months, the attorney had filed appellate proceedings in the Second District without a fee or an order of indigency.[562] The court stated that it was apparent from the attorney's presentation at the hearing on the order to show cause that the attorney was not willfully disobeying the court's orders, but that he did not understand the basic procedures for establishing indigency status in an appellate proceeding.[563] Accordingly, the court concluded that a fine would not be the most productive solution to the problem.[564] Instead, the court ordered the attorney to obtain, within twelve months, a minimum of ten hours of continuing legal education in appellate practice or procedure, in addition to the continuing legal education required of attorneys by rule 6-10.3 of the *Rules Regulating The Florida Bar*.[565]

In *Beaubrum v. Rolle*,[566] the Third District directed an attorney, who had acted as a special assistant public defender, to deliver to the petitioner all documents and transcripts in his possession that related to the circuit court and appellate proceedings in the case.[567] When he failed to do so, the court appointed a commissioner to take testimony and to make findings and recommendations as to whether the attorney should be disciplined by way of determination that he was in contempt of court.[568] The commissioner concluded that the attorney had been negligent, but noted that some mitigating factors existed.[569] He recommended that the attorney be found in contempt of the Third District, that he be fined an amount to be

559. 20 Fla. L. Weekly D1232 (2d Dist. Ct. App. May 19, 1995).
560. *Id.* at D1232.
561. *Id.*
562. *Id.*
563. *Id.* at D1232-33.
564. *Keene*, 20 Fla. L. Weekly at D1233.
565. *Id. See* R. REGULATING FLA. BAR 6-10.3.
566. 654 So. 2d 560 (Fla. 3d Dist. Ct. App. 1994).
567. *Id.* at 560.
568. *In re* Rolle, 654 So. 2d 560 (Fla. 3d Dist. Ct. App. 1995).
569. *Id.* at 560.

determined by the court and that he be required to pay a court reporter fee of $113.[570] Based upon this recommendation, the court ordered the attorney to show cause why he should not be fined $500 and required to pay the $113 court reporter fee.[571] When the attorney failed to respond to the order, the court found him in contempt and imposed the above-noted sanctions.[572]

In *State v. Davis*,[573] the court "reluctantly" granted a motion to reinstate an appeal that had been dismissed because the appellant's counsel did not timely file a brief or move for an extension of time.[574] The court accepted counsel's grounds for reinstatement, which were not set forth in the opinion, but stated that it was writing the opinion "as a reminder that such noncompliance with the Rules of Appellate Procedure will not be tolerated."[575] The court "further caution[ed] that orderly and timely appellate practice can also be assured by fines, costs, reprimand and contempt against an attorney."[576]

Similar language was used in *Hastings v. State*,[577] when the Second District quashed a circuit court order dismissing an appeal from a county court judgment due to the untimely filing of the appellant's initial brief.[578] In opposing the petition for writ of certiorari filed in the district court, the circuit judge argued that tardiness in prosecuting appeals is a continuing problem in his court and that denying him the right to dismiss the appeal would be "emasculating the appellate rules and destroying the efficiency of his court 'for there is no other sanction that the Circuit Court can impose upon negligent appellate counsel that is as effective.'"[579]

The district court, while expressing its appreciation for the exasperation of the judge, disagreed, concluding that "fines, costs, reprimand, and contempt *against the attorney* will insure an orderly and timely appellate practice in circuit court."[580]

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570. *Id.* at 560-61.
571. *Id.* at 561.
572. *In re* Beaubrum, 654 So. 2d 561 (Fla. 3d Dist. Ct. App. 1995).
573. 19 Fla. L. Weekly D2399 (4th Dist Ct. App. Nov. 16, 1994).
574. *Id.* at D2399.
575. *Id.*
576. *Id.*
577. 640 So. 2d 115 (Fla. 2d Dist. Ct. App. 1994).
578. *Id.* at 116.
579. *Id.* at 117.
580. *Id.* (emphasis added).

XXV. STAYS

Receding from its prior precedent, the Fourth District, in *Florida Eastern Development Co. v. Len-Hal Realty*,[581] found that Title 11 of the *United States Code*, section 362(a)(1), which provides for an automatic stay of all legal proceedings "against" a debtor who has filed a suggestion of bankruptcy under chapter 11 of the Bankruptcy Code, is applicable to appellants in the district court in cases in which the original trial proceedings were "against them."[582]

The court had previously held, in *Marine Charter & Storage v. Underwriters*,[583] that the provision did not apply to debtors who were appellants because appeals are proceedings brought by, not against, appellants.[584] The court in *Florida Eastern*, however, was swayed by the fact that all federal courts that have considered the issue have found that the stay applies whenever the original proceedings were against the debtor, regardless of whether the debtor was an appellant or appellee on appeal.[585] The court therefore receded from *Marine Charter*,[586] and acknowledged the applicability of the stay to appellants when the trial level proceedings were against them.[587]

XXVI. ATTORNEY'S FEES AND COSTS

A. *Attorney's Fees*

1. Timeliness of Award of Appellate Attorney's Fees

In *Judges of the Eleventh Judicial Circuit v. Janovitz*,[588] the supreme court held that "when a motion for appellate attorney's fees has been timely filed, the court may enter an award of attorney's fees within a reasonable time after the issuance of the mandate."[589] The court further noted that there is no requirement that the award be made in the same term of court so long as it is entered within a reasonable time.[590] The court thus upheld an

581. 636 So. 2d 756 (Fla. 4th Dist. Ct. App. 1994) (en banc).
582. *Id.* at 757. *See* 11 U.S.C. § 362(a)(1) (1994).
583. 568 So. 2d 944 (Fla. 4th Dist. Ct. App. 1990).
584. *Id.* at 946.
585. 636 So. 2d at 757.
586. *Id.* at 758.
587. *Id.* at 757.
588. 635 So. 2d 19 (Fla. 1994).
589. *Id.* at 20.
590. *Id.*

award of appellate attorney's fees that was entered by a circuit court acting in its appellate capacity fifty-four days after it had issued its mandate.[591] The court disapproved of the Third District's decision in *Dyer v. City of Miami Employee's Retirement Board*,[592] which had concluded that the circuit court lacked jurisdiction to enter an order on attorney's fees after its mandate had issued.[593]

2. Application of a Multiplier to Appellate Attorney's Fees

In *Stack v. Lewis*,[594] the trial court applied a multiplier in awarding attorney's fees due to "'the substantial uncertainty of prevailing, the substantial uncertainty of collecting and because the result obtained was the maximum possible result.'"[595] On review, the appellant argued that the multiplier should not apply to the fees earned from the appeal.[596] The appellant reasoned that the appeal process began a new case and that the appellee's likelihood of success on appeal was high since he won in the trial court.[597] The First District disagreed, noting that the moment for determining the likelihood of success is "'at the outset'" or "'at the time the case was initiated,'"[598] and that the appellee employed the same attorneys from the beginning of the litigation through appeal.[599] In light of these factors, and the fact that both the trial and appellate work were governed by a contingency arrangement, the court concluded that there was "no reason to treat the appellate hours differently from the trial hours."[600]

3. Appellate Attorney's Fees Pursuant to Section 768.79 of the *Florida Statutes*

In *Mark C. Arnold Construction Co. v. National Lumber Brokers, Inc.*,[601] the trial court awarded fees and costs pursuant to section 768.79(1) of the *Florida Statutes*, because the judgment was "'at least 25 percent

591. *Id.*
592. 512 So. 2d 338 (Fla. 3d Dist. Ct. App. 1987).
593. *Janovitz*, 635 So. 2d at 20.
594. 641 So. 2d 969 (Fla. 1st Dist. Ct. App. 1994).
595. *Id.* at 970.
596. *Id.*
597. *Id.*
598. *Id.* (citing Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1151 (Fla. 1985)).
599. *Stack*, 641 So. 2d at 970.
600. *Id.*
601. 642 So. 2d 576 (Fla. 1st Dist. Ct. App. 1994).

greater than'" the pretrial demand for judgment.[602] After affirming the judgment per curiam without opinion,[603] the First District aligned itself with the Fourth[604] and Fifth[605] Districts in granting, on the same grounds as the trial court, the appellee's motion for an award of reasonable costs and attorney's fees incurred in successfully defending the judgment on appeal.[606]

4. Appellate Attorney's Fees in Eminent Domain Matters

In *Department of Transportation v. Gefen*,[607] the supreme court held that a landowner claiming inverse condemnation is only entitled to appellate attorney's fees if the claim is ultimately successful.[608] Thus, the court found that a landowner who prevailed in the district court was not entitled to attorney's fees when the supreme court quashed the district court decision.[609]

5. Review of Orders Determining the Right to Attorney's Fees but Not Setting the Amount

Each of the district courts of appeal have recently ruled that orders determining the right to attorney's fees, which do not set the amount of such fees, are not appealable.[610]

B. *Costs*

In *Lee County v. Eaton*,[611] the trial court entered an order requiring Lee County, a nonparty to a civil action between two individuals, to pay the cost of a transcript used on appeal by a successful appellant.[612] The trial

602. *Id.* at 576.
603. *Id.*
604. Schmidt v. Fortner, 629 So. 2d 1036, 1043 n.10 (Fla. 4th Dist. Ct. App. 1993).
605. Williams v. Brochu, 578 So. 2d 491, 495 (Fla. 5th Dist Ct. App. 1991).
606. *Mark C. Arnold Construction*, 642 So. 2d at 576.
607. 636 So. 2d 1345 (Fla. 1994).
608. *Id.* at 1347.
609. *Id.*
610. *See* Wometco Enters. v. Cordoves, 650 So. 2d 1117 (Fla. 1st Dist. Ct. App. 1995); Trans Atlantic Distribs., L.P. v. Whiland & Co., S.A., 646 So. 2d 752 (Fla. 5th Dist. Ct. App. 1994); McIlveen v. McIlveen, 644 So. 2d 612 (Fla. 2d Dist. Ct. App. 1994); Gonzalez Eng'g, Inc. v. Miami Pump & Supply Co., Inc., 641 So. 2d 474 (Fla. 3d Dist. Ct. App. 1994); Winkelman v. Toll, 632 So. 2d 130 (Fla. 4th Dist. Ct. App. 1994).
611. 642 So. 2d 1126 (Fla. 2d Dist. Ct. App. 1994).
612. *Id.* at 1126.

court concluded that because the appellant was indigent, she was entitled to certain court services without charge under section 57.081(1) of the *Florida Statutes* (1993).[613]

The Second District reversed the order, stating: "Although an indigent person is entitled to receive some services of the court system without charge, this statutory right has never been interpreted to require a county to pay for a transcript in a typical civil action filed by an indigent person in that county's circuit court."[614] The court also stated that although section 57.081(1) specifies that an indigent person is entitled to free services from "'the courts, sheriffs, and clerks,'"[615] no reference is made in the statute "'to county-subsidized services from the official court reporter, nor is there any reference to free transcripts in Florida Rule of Appellate Procedure 9.430.'"[616] Further, the court continued: "There is no constitutional right to a free transcript in such an appeal."[617]

XXVII. A LOOK TO THE FUTURE

In the upcoming year, the Florida Appellate Court Rules Committee, pursuant to Florida Rule of Judicial Administration 2.130, will submit its four-year cycle report to the supreme court, recommending changes to the appellate rules. The court will likely ask for comments on the committee's report in the spring of 1996 and adopt such changes as it deems appropriate that fall. Also in the upcoming year, the First District is expected to set up an appellate mediation program. Such programs have the potential to have significant impact on the appellate process. Of course, the courts this coming year will provide answers to many of the questions raised by the cases discussed in this article. The answers, as they usually do, will likely generate new questions. Those questions, and others, will continue to produce the large number of court decisions that shape the field of appellate practice.

613. *Id.*
614. *Id.* at 1126-27.
615. *Id.* at 1127.
616. *Eaton*, 642 So. 2d at 1127.
617. *Id.*

Criminal Law: 1995 Survey of Florida Law

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TABLE OF CONTENTS

I. INTRODUCTION

This article discusses Supreme Court of Florida decisions in the area of substantive criminal law handed down between July 1, 1994 and July 1,

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1995.[1] As with past survey articles on criminal law, this one does not discuss issues regarding the death penalty as that topic is so specialized that it deserves special treatment on its own. Likewise, the application of Florida's sentencing guidelines is also a special topic excluded from this article's discussion. Cases from Florida's district courts of appeal are mentioned in the footnotes to the extent that their inclusion supplements the textual discussion. Similarly, new legislation is mentioned when it relates to the continuing importance of a discussed case.

Even after cases mainly involving the death penalty and the sentencing guidelines are eliminated, the survey still does not discuss every Supreme Court of Florida case. Those cases which merely discuss the application of standard, or fairly standard, fact situations to a well-settled rule of law have also been eliminated. This article is divided into two main parts. The first part discusses Supreme Court of Florida cases concerning major questions of substantive criminal law that do not involve constitutional questions. The second part discusses supreme court cases concerning constitutional challenges to some of Florida's substantive criminal law statutes.

II. NONCONSTITUTIONAL DECISIONS

A. *Felony Petit Theft*

Florida Statutes section 812.014 defines the crime of theft.[2]

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1. The author has chosen for his cut-off point decisions reported up to, and including 655 So. 2d. Thus, some Supreme Court of Florida cases decided before July 1, 1995 are not included in this article.

2. FLA. STAT. § 812.014(1) (Supp. 1994) defines theft as:

> knowingly obtain[ing] or us[ing], or endeavor[ing] to obtain or to use, the property of another with intent to, either temporarily or permanently:
> (a) Deprive the other person of a right to the property or a benefit therefrom.
> (b) Appropriate the property to [the accused's] own use or to the use of any person entitled thereto.

Id.

This subsection's language makes it clear that section 812.014 is intended to be an omnibus theft statute. Thus, the definition of theft not only includes the former common law offense of larceny but also includes such former offenses as embezzlement. *See, e.g.*, State v. Mischler, 488 So. 2d 523, 524 (Fla. 1986) (finding that a bookkeeper who stole her employer's business assets would now be guilty of theft under section 812.014(1)). The definition also includes what would otherwise be considered attempted thefts as well as completed thefts. State v. Sykes, 434 So. 2d 325, 327 (Fla. 1983). Thus, there is no crime of attempted theft in Florida. *Id.*

Section 812.014 also establishes various degrees of this offense.[3] A convicted defendant can be guilty of as low an offense as a second-degree misdemeanor and as high an offense as a first-degree felony for grand theft. The offense degree depends on the value of the property stolen or on the presence of special aggravating factors.

Theft of property worth less than $300 is a second-degree misdemeanor unless special factors exist to raise the offense's degree.[4] Generally, proof of the value of a stolen item, or items, is essential to establishing more than a second-degree misdemeanor petit theft,[5] unless a special aggravating factor exists.

There are two types of special aggravating factors: repeated thefts by the same person and the type of property stolen. While theft of property worth less than $300 is usually a second-degree misdemeanor, the crime becomes a first-degree misdemeanor if the offender has committed one previous theft, and becomes a third-degree felony if the offender has committed two or more previous thefts.[6]

Questions have arisen as to whether the circumstances making a theft more than a second-degree misdemeanor must be specifically alleged in the charging document. While the general answer to this was "yes," doubt still remained as to whether the state's failure to allege the prior theft convictions relied upon to aggravate a petit theft to a felony made raising the offense level impossible. In 1985, the Supreme Court of Florida in *State v.*

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3. FLA. STAT. § 812.014(2)(a)-(d). These subsections do not establish separate theft definitions but merely set the degree of the theft offense involved. For further discussion on the degrees of theft offenses, see Johnson v. State, 597 So. 2d 798 (Fla. 1992).

4. FLA. STAT. § 812.014(2)(d).

5. *E.g.*, M.H. v. State, 614 So. 2d 657, 658 (Fla. 2d Dist. Ct. App. 1993) (finding proof that stolen property worth $100 was insufficient to make the crime a grand theft because § 812.014(1)(c)1 made $300 the statutory dividing point between grand and petit theft); S.M.M. v. State, 569 So. 2d 1339, 1341 (Fla. 1st Dist. Ct. App. 1990) (finding proof of value essential to degree of theft offense); F.W. v. State, 459 So. 2d 1129, 1129 (Fla. 3d Dist. Ct. App. 1984) (finding the State's failure to prove value required reducing a grand theft conviction to a petit theft conviction).

6. FLA. STAT. § 812.014(2)(d). Until 1992, the previous conviction which would increase the degree of an otherwise second-degree misdemeanor petit theft was statutorily limited to previous petit thefts. Thus, in State v. Jackson, 526 So. 2d 58, 59 (Fla. 1988), the court found that two prior grand theft convictions could not be used to reclassify Jackson's petit theft. However, in 1992 the language of § 812.014(2)(d) was changed from "conviction for petit theft" to "conviction of any theft," thus indicating the legislature's intent to overrule *Jackson*. Ch. 92-79, §1, 1992 FLA. LAWS 741, 742 (codified at FLA. STAT. § 812.014(2)(d) (1993).

Phillips[7] held that a charge entitled "Felony Petit Theft" citing to the statute which defines the substantive crime and reciting facts which would support a conviction under the statute was not fundamentally defective for failing to allege the prior theft convictions which made the offense a felony when the defense had not moved to dismiss or object to the charge.[8] However, six years later in *State v. Rodriguez*,[9] while discussing the offense of felony DUI, the supreme court considered "whether a charging document must specifically allege . . . [the needed] prior convictions . . . when charging a defendant with felony DUI to confer jurisdiction on the circuit court and to comply with due process of law."[10] Since the State conceded that prior DUI convictions were essential elements of felony DUI, the court found that "it necessarily follows that the requisite notice . . . [of them] must be given in the charging document."[11] The *Rodriguez* court noted that the sole issue in *Phillips* was whether the charging document was so defective that it deprived the circuit court of jurisdiction over the case, not whether the charge was so defective that it could not support a conviction.[12] The court in *Rodriguez* agreed that a charging document, titled "Felony Petit Theft" and merely citing the appropriate subsection of section 812.014, was sufficient to invoke the circuit court's jurisdiction.[13] Thus, when the defense did not object to the court's jurisdiction beforehand, there was no defect in proceeding to trial. However, the court found that when the defense was not notified of any alleged prior convictions, the prior convictions could not be used afterwards to make the petit theft a felony.[14]

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7. 463 So. 2d 1136 (Fla. 1985).

8. *Id.* at 1137-38. *Phillips* arose in connection with a post-conviction objection to the circuit court's jurisdiction over the charge. *Id.* at 1137. Although the state did not allege the two prior theft convictions in the charge itself, the state gave written notice at the defendant's arraignment of its intention to enhance his offense to a felony based upon the two prior petit theft convictions. *Id.* While it was not specifically mentioned in the court's holding, this written notice appears to be a significant factor distinguishing the result in *Phillips* from later decisions.

9. 575 So. 2d 1262 (Fla. 1991).

10. *Id.* at 1263.

11. *Id.* at 1265.

12. *Id.* at 1264.

13. *Id.*

14. *Rodriguez*, 575 So. 2d at 1266-67. Unlike *Phillips*, the state in *Rodriguez* did not give pre-trial notice to the defense concerning any details of the accused's alleged prior convictions. *Id.*

Despite *Rodriguez*, there was still conflict among the district courts of appeal[15] over whether prior theft convictions must be alleged in the charging document itself to charge an accused with felony petit theft. During this past year, the Supreme Court of Florida appears to have conclusively resolved this issue with its decision in *Young v. State*.[16] There after his conviction for petit theft, the state moved successfully to enhance Young's offense to a felony.[17] The effect of this was to change Young's prison sentence from five to ten years.[18] The Second District Court of Appeal affirmed,[19] but the Supreme Court of Florida reversed.[20] The court noted that felony petit theft had long been considered a substantive offense in Florida.[21] Thus, the court found that to be consistent with *Rodriguez*, "precedent . . . require[d] that the elements of the felony petit larceny statute be alleged in the charging document."[22] In the short term, *Young* will no doubt lead to reversals in those cases where the state made no attempt at all to initially charge the elements of felony petit theft.[23] Even in the long run, *Young*, unfortunately, may not have provided as many answers as one would expect and desire. First, the court did not explicitly require that the state specifically allege the date and place of an accused's prior theft convictions. However, the opinion implies this is necessary.[24] Second, the court did not address whether *Young* also applies to those cases

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15. *Compare* State v. Crocker, 519 So. 2d 32, 33 (Fla. 2d Dist. Ct. App. 1987) (not requiring such allegations of prior convictions) *with* Clay v. State, 595 So. 2d 1052, 1053 (Fla. 4th Dist. Ct. App. 1992) (finding such allegations required based on *Rodriguez*).

16. 641 So. 2d 401 (Fla. 1994).

17. *Id.* at 402.

18. *Id.* Young received the ten-year sentence as a habitual offender. *Id.*

19. Young v. State, 630 So. 2d 1113 (Fla. 2d Dist. Ct. App. 1993), *review granted*, 634 So. 2d 629 (Fla.), *and quashed by* 641 So. 2d 401 (Fla. 1994).

20. *Young*, 641 So. 2d at 403.

21. *Id.* at 402. *E.g.*, State v. Harris, 356 So. 2d 315 (Fla. 1978).

22. *Young*, 641 So. 2d at 403.

23. *E.g.*, Gallon v. State, 648 So. 2d 309, 309 (Fla. 2d Dist. Ct. App. 1995) (reversing a felony petit theft conviction where the elements of this offense were not specifically charged).

24. The *Young* decision requires the state to "include language to the effect that . . . [should] the defendant [be convicted] . . . of petit theft, the defendant is also charged with felony petit theft under section 812.014(2)(d) by reason of the previous convictions of two or more thefts *as thereafter described.*" 641 So. 2d at 403 n.4. (emphasis added).

This language appears to demand three things in a charging document alleging felony petit theft: 1) notice of the state's intent to increase any petit theft conviction; 2) an express citation to the subsection allowing such increase; and 3) descriptions of the prior convictions that will be relied upon to increase the offense.

where the state wishes to increase a petit theft conviction from a second-degree misdemeanor, to a first-degree misdemeanor due to the accused already having one theft conviction. Finally, the requirement in *Young* will be easy to satisfy where only petit theft offenses are being charged but what about those cases where grand theft or some other offense is involved? When the state wishes to retain the possibility of convicting a defendant of felony petit theft if the accused is found guilty of petit theft as a lesser included offense, must it charge in the alternative to satisfy *Young*?[25]

Young does provide the answer to one situation which has concerned the courts. The state will not have to prove the existence of the prior convictions during a trial itself. *Young* recognized that allowing such a procedure would present a high likelihood of unfairly prejudicing an accused. Instead, even in a jury trial, the state must prove the existence of the accused's previous theft convictions in a separate post-trial hearing before the trial court.[26] Indeed, in a jury trial all possible steps must be taken to keep the previous theft convictions from the jury, so that the accused's presumption of innocence is preserved.[27]

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25. Two cases illustrate that this scenario is possible and the barrier *Young* may raise to securing felony petit theft convictions. In *Crocker*, 519 So. 2d at 33, the accused was charged with resisting an officer with violence and grand theft. Crocker was convicted of the resisting charge and of petit theft. The district court of appeal held the petit theft conviction could be reclassified to felony petit theft despite the State's failure to allege the prior theft convictions. *Id.* at 33-34. The court reasoned that otherwise "the state would have to charge . . . felony petit theft, in the alternative, in every case that a jury could find the defendant guilty of petit theft as a lesser included offense of the crime actually charged." *Id.* at 33.

However, the Supreme Court of Florida rejected *Crocker* in *Young*. 641 So. 2d at 403. Even when theft charges are not initially involved, *Young* may cause later problems. Theft is considered a lesser included offense of robbery. Thus, when robbery is charged, the state sometimes does not separately allege a theft. However, if an accused is acquitted of robbery and merely found guilty of petit theft, no enhancement would be possible unless the state alternatively alleged first-degree misdemeanor or felony petit theft.

26. The court noted with approval that such a process was mandated in *Rodriguez*, which itself cited with approval the court's earlier decision in *Harris*, on this point. *Rodriguez*, 575 So. 2d at 1264-65. Both *Harris* and *Rodriguez* were once again approved in *Young*. 641 So. 2d at 402-03.

27. Thus, if a charging document is allowed into the jury room, all mention of a felony petit theft charge and of the prior convictions must be excised from it. *Young*, 641 So. 2d at 403 n.4.

Although *Young* does not explicitly say so, its decision suggests that where prior theft convictions are the sole basis for increasing a theft charge, neither the court nor the prosecutor should refer to the charge as "felony petit theft" in the jury's presence.

B. *Robbery*

Robbery at common law was a combination of two other common law offenses: larceny and assault. The distinguishing feature between a larceny and a robbery was force. Larceny was a theft accomplished without force, while robbery was a theft accomplished by force or the threat of force. The Florida statutory codifications of these two offenses have retained this common law distinction.[28] Under present Florida law, a mere wrongful taking cannot be a robbery. The present definition of robbery contains two act requirements: 1) there must be a taking of another's property from that person's custody, and 2) during this taking there must be "the use of force, violence, assault, or putting in fear."[29] Prior to 1987, a series of Florida cases reversed robbery convictions based upon the conclusion that while the defendant used force, this force was not used to gain possession of the property involved so only a theft had occurred.[30] Florida courts consistently found that use of force in an escape, or an attempt to escape after a wrongful taking, did not make the taking a robbery.[31] In so doing, the courts rejected the argument that former *Florida Statutes* section 812.13(3), now section 812.13(3)(a), broadened the definition of robbery in section 812.13(1).[32] The 1987 Florida Legislature remedied this situation by

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28. Since the Florida statutory definition only requires that an assault, and not an actual battery accompany the taking, a defendant can be convicted of both robbery and battery for the same incident in Florida without creating double jeopardy problems. FLA. STAT. § 812.13(1). For a recent case holding that such multiple convictions are possible, see Hamrick v. State, 648 So. 2d 274, 275 (Fla. 4th Dist. Ct. App. 1995).

29. FLA. STAT. § 812.13(1).

30. *E.g.*, Royal v. State, 490 So. 2d 44 (Fla. 1986). The *Royal* court found that defendants, who pushed aside a store detective and then pointed a gun at another employee during their escape, could not be convicted of robbery since they had already obtained wrongful possession of the goods involved before these acts occurred. *Id.* at 45-46. The court held that the statutorily required "'force, violence, assault, or putting in fear' must occur prior to or contemporaneous with the taking of property." *Id.* at 45.

31. *E.g.*, Milam v. State, 505 So. 2d 34, 34 (Fla. 5th Dist. Ct. App. 1987) (holding that force used in an attempted escape from a store after goods have been taken came too late to make the crime a robbery). *See also* Walker v. State, 493 So. 2d 77, 78 (Fla. 4th Dist. Ct. App. 1986) (holding that the act of violence outside of the store following actual theft did not support a robbery charge).

32. *Royal*, 490 So. 2d at 46 (citing FLA. STAT. § 812.13(3)(a) (1983)). *Florida Statutes* section 812.13(3)(a) states that "[a]n act shall be deemed 'in the course of committing the robbery' if it occurs in an attempt to commit robbery or in flight after the attempt or commission." FLA. STAT. § 812.13(3) (1983). Rather than broadening the definition of robbery in section 812.13(1), the Supreme Court of Florida found that section 812.13(3) was only intended to broaden the scope of robbery for purposes of deciding the degree involved under section 812.13(2). *Royal*, 490 So. 2d at 46.

passing section 812.13(3)(b) which broadened the traditional scope of a common law taking to include an act occurring after the taking "if it and the act of taking constitute a continuous series of acts or events."[33] Under such language, force used immediately after a wrongful taking occurs appears to be sufficient to convert the theft into a robbery.[34]

Jones v. State[35] recently settled any question about the sufficiency of this language to produce such a result. There, among other issues raised about his convictions and sentences, the defendant claimed that the force involved was not sufficient to sustain his two convictions for armed robbery. The jury had found Jones guilty of the first-degree murders and armed robberies of his former employer and the employer's wife. Both victims were found stabbed to death in their place of business, where Jones was found suffering from a bullet wound. Besides Jones there was no eye-witness to the homicides. From the evidence it appeared that one victim had been stabbed from behind and that the second victim had been stabbed in the chest. Jones claimed that he should have been acquitted of the two armed robbery charges since the victims never perceived the use of force or violence in connection with the taking of their property. Jones further contended that the evidence was only sufficient to establish a "posthumous theft" rather than a robbery as both victims could have been dead at the time he actually took their property. In an important decision, the Supreme Court of Florida rejected both arguments and affirmed Jones' armed robbery convictions.[36]

The court first focused on the language in section 812.13(3)(b), defining what constitutes "in the course of the taking" for purposes of a

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33. FLA. STAT. § 812.13(3)(b) (1987).

34. *E.g.*, Santilli v. State, 570 So. 2d 400, 402 (Fla. 5th Dist. Ct. App. 1990) (finding that a defendant who shoplifted from a store and then tried to hit the store's security guard with his car when confronted about the theft used force "in the course of taking" and thus committed robbery). *Santilli* rejected the argument that as long as the accused does not abandon the stolen property, there will always be a sufficient nexus between the wrongful taking and later force to convert the theft into a robbery. *Id.* at 401-02. Instead, the court suggested that an examination be made of the time and space between the theft and the use of force. *Id.*

If a defendant abandons the stolen property and only then tries to use some force or threat to escape, some courts have held that there is not "a continuous series of acts or events" between the taking and the force or threat to constitute a robbery. *E.g.*, Garcia v. State, 614 So. 2d 568 (Fla. 2d Dist. Ct. App. 1993); Simmons v. State, 551 So. 2d 607 (Fla. 5th Dist. Ct. App. 1989); State v. Baker, 540 So. 2d 847 (Fla. 3d Dist. Ct. App. 1989).

35. 652 So. 2d 346 (Fla.), *cert. denied*, 116 S. Ct. 202 (1995).

36. *Id.* at 353.

robbery. According to the court, this language meant that a "taking of property that otherwise would be considered a theft constitutes robbery"[37] when the necessary element of force is present. This force or violence element under the added statutory language could occur before, contemporaneously with, or even after the taking of the property, "so long as both the act of violence or intimidation and the taking constitute a continuous series of acts or events."[38]

The court also rejected the argument that a victim has to know that force or violence is being used upon the victim's person in order for there to be a robbery.[39] Looking at the statute's plain language, the court found that the basic definition in section 812.13(1) only requires the use of force during the taking and does not require that the victim be aware of the use of force.[40] As the court stated, "where the defendant employs force or violence that renders the victim unaware of the taking, the force or violence component of the robbery statute is satisfied."[41] Thus, even if the two victims here were unaware that Jones was attacking them to take their property, the force element needed for robbery was met. The court found that the murders and the taking of the property were clearly part of one continuous series of events and thus the accused had been properly convicted of robbery.[42]

C. *Sexual Offenses Involving Children*

The Supreme Court of Florida handed down four important decisions concerning sexual offenses involving children in the past year. Two of these decisions concerned constitutional challenges to sections of the *Florida Statutes*, while the two other decisions involved issues of statutory

37. *Id.* at 349.
38. *Id.*
39. *Id.*
40. *Jones*, 652 So. 2d at 349.
41. *Id.* at 350.
42. *Id.* Jones also argued that he had been improperly convicted of one of the robberies because there was no evidence the property involved in that crime had been "'taken from . . . [the victim's] person or from . . . [the victim's] immediate custody or control.'" *Id.* The court rejected the argument that the property taken must be on the victim's person or in the victim's presence. *Id.* If the property was "sufficiently under the victim's control so that the victim could have prevented the taking if . . . not . . . subjected to violence or intimidation by the robber," then the requirement in § 812.13(1) that the property be taken "'from the person or custody of another'" is met. *Jones*, 652 So. 2d at 350.

construction. The latter two decisions are discussed below, while the others are discussed later in this survey.[43]

The two decisions that did not involve constitutional challenges both involved questions concerning former *Florida Statutes* section 794.041, which relates to "[s]exual activity with child by or at solicitation of person in familial or custodial authority; penalties."[44] Both decisions were handed down on the same date. One decision, *Thompson v. State*,[45] addressed the issue of whether a defendant could be convicted of both sexual activity while in custodial authority of a child and of sexual battery on a physically incapacitated victim[46] based on evidence of a single sexual act. Thompson had been convicted of both offenses and sentenced to two concurrent nine-year terms based on a single sexual act. The First District Court of Appeal affirmed these convictions but noted possible conflict with other district courts of appeal's decisions.[47] In a short opinion, the Supreme Court of Florida reversed a finding that the prohibition against multiple punishments had been violated.[48] In earlier decisions, the court had found "multiple punishments impermissible [when] based on a single act if the various offenses are distinguished only by degree elements."[49] The court found,

43. See discussion *infra* part III.B. for the two cases involving the constitutional challenges.

44. The Florida Legislature repealed this section in 1993. Ch. 93-156, § 4, 1993 Fla. Laws 907, 911. However, the provisions of this former section were replaced by present section 794.011(8)(a)-(b). FLA. STAT. § 794.011(8)(a)-(b) (Supp. 1994).

45. 650 So. 2d 969 (Fla. 1994).

46. FLA. STAT. § 794.011(4)(f). Unlike § 794.041, this section has not been amended or repealed.

47. Thompson v. State, 627 So. 2d 74, 74 (Fla. 1st Dist. Ct. App. 1993), *quashed by* 650 So. 2d 969 (Fla. 1994). The court noted possible conflict with the decision in George v. State, 488 So. 2d 589, 590 (Fla. 2d Dist. Ct. App. 1986) (finding only one sexual battery conviction was proper once the evidence established only one unlawful penetration). *Thompson*, 627 So. 2d at 74.

48. *Thompson*, 650 So. 2d at 969.

49. *Id.* The supreme court relied on its decisions in Sirmons v. State, 634 So. 2d 153 (Fla. 1994) and Goodwin v. State, 634 So. 2d 157 (Fla. 1994), for its decision in *Thompson*. *Id.* In *Sirmons*, the court held that an accused could not be convicted of both grand theft auto and robbery with a weapon based on a single taking of an automobile at knifepoint. 634 So. 2d at 154. The court found that only one base offense, theft, was factually involved and that both charges were merely varying degrees of this base offense. *Id.* In *Goodwin*, the court relied on *Sirmons* to find that convictions for both vehicular manslaughter and for unlawful blood alcohol level ("UBAL") manslaughter, stemming from one death, was not permissible. 634 So. 2d at 157.

without discussion, that such was clearly the case here.[50] Thus, two convictions and punishments, even when they were to run concurrently, were not permissible.[51]

The second case provided a much more intensive and important discussion of *Florida Statutes* section 794.041. In *Hallberg v. State*,[52] the Supreme Court of Florida decided what it means for a person to be "in a position of . . . custodial authority."[53] Hallberg had been convicted of five counts of lewd acts upon a child and three counts of engaging a child in sexual activities by a person in a position of familial or custodial authority. For each of the lewd acts he was sentenced to ten years imprisonment and for each of the sexual activities by a custodial authority, he received twenty-seven years imprisonment. All sentences were to run concurrently. Hallberg appealed his convictions of sexual activity by a person in a position of familial or custodial authority contending that he did not stand in such a relationship to the victim here. Hallberg was clearly not a parent or other relative of the victim, thus the State conceded that he could not be in a position of "familial" authority. The question remained whether he could be in a position of "custodial" authority at the time of the sexual activity involved.

Hallberg was employed as a junior high school teacher, and his victim was enrolled in one of his honors classes during her eighth grade year. Following the eighth grade year, the victim planned to take another honors class with Hallberg the next year. During the summer recess, Hallberg went to the victim's home where he committed the sexual acts involved. This particular visit to the victim's home occurred at a time when Hallberg had no teaching or other supervisory responsibility over the student-victim. As the court noted in its opinion, "[i]t is undisputed that these events did not occur during the school year and that they did not occur in connection with Hallberg's assigned teaching responsibilities or a recognized extracurricular event."[54] The State still raised three arguments to support Hallberg's

50. Although the opinion does not state such, the supreme court must have found that both convictions were merely aggravated forms of one base offense, sexual battery.

51. Both *Sirmons* and *Goodwin* had cited FLA. STAT. § 775.021(4)(b)(2) in concluding that the dual convictions were impermissible in those cases. *Sirmons*, 634 So. 2d at 153-54; *Goodwin*, 634 So. 2d at 157. In *Thompson*, the court did not cite the present version of § 775.021, but instead cited directly to article I, section 9 of the *Florida Constitution*. 650 So. 2d at 969.

52. 649 So. 2d 1355 (Fla. 1994).

53. *Id.* at 1355 (quoting FLA. STAT. § 794.041(2) (1987)). Similar language is now found in FLA. STAT. § 794.011(8).

54. *Id.* at 1356.

convictions. First, the State argued that as a teacher, Hallberg always stood in a position of *in loco parentis* over his students and thus was legally responsible for their welfare. Secondly, the State contended that the victim's parents consented to Hallberg's visit and thus vested him during that time with custodial authority over her. Finally, the state argued that the close relationship between Hallberg and the victim placed him in a custodial status over her. The court rejected these arguments and found that "teachers are not, by reason of their chosen profession, custodians of their students at all times, particularly when school is recessed for the summer."[55] Instead, the court agreed with the analysis set forth in Judge Altenbernd's dissent to the Second District Court of Appeal's affirmance of Hallberg's convictions. Judge Altenbernd, after first noting the events did not occur during the school year or on school property, nor in connection with any sort of school extracurricular activity, noted that the victim's parents, while aware that the defendant wanted the victim to help him prepare for an upcoming class over the summer, did not consent to his visits to their home, nor did they have knowledge of such. Judge Altenbernd turned to the dictionary definition of custodian. According to *Webster's Third International Dictionary*, the definition of "custodian" was "someone who has custody of another,"[56] custody implies a duty or obligation to care for the other person. As there was no school activity going on and the victim's parents had not placed the defendant in a custodial authority over her, Judge Altenbernd believed this was not satisfied. The Supreme Court of Florida agreed with this reasoning finding that "the term 'custodial,' absent a statutory definition, must be construed in accordance with the commonly understood definition as one having custody and control of another."[57] The court found that if the state's broad definition of custody were agreed to, it would be possible that an accused might not even know that he had custody over a child when engaging the child in sexual activity.[58] Based upon the rule of leniency that a criminal statute should be construed most favorably to the accused,

55. *Id.* at 1357.

56. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 559 (1986) (quoted in Hallberg v. State, 621 So. 2d 693, 705 (Fla. 2d Dist. Ct. App. 1993) (Altenbernd, J., concurring in part and dissenting in part), and *Hallberg*, 649 So. 2d at 1357).

57. *Hallberg*, 649 So. 2d at 1358.

58. *Id.*

the court found that such a broad construction should be rejected and a narrower one as urged by Judge Altenbernd accepted.[59]

Justice Shaw, in an extensive dissent, argued that the court's definition ignored the plain language of section 794.041.[60] Justice Shaw focused on the language in section 794.041(2) stating, any person "who stands in a position of [familial or] custodial authority."[61] In his view, a teacher stands in the position of custodial authority over a student at all times, even during the summer.[62] Thus, in Justice Shaw's view, one need not have actual custodial authority over a child victim as long as one stands in such a potential position. Since teachers hold the power position over their students, he believed that this was enough to violate section 794.01 and would have affirmed Hallberg's conviction.[63] Indeed, in this particular case, Justice Shaw found that a direct connection between the accused's position as a teacher and the victim's position as a student led to the victim giving in to the teacher's sexual demands, thus, in his view, violating section 791.041.[64]

The Florida Legislature repealed *Florida Statutes* section 794.041, the main section discussed in both these cases, in 1993.[65] However, in so doing, the legislature added a new subsection, section 794.011(8), to section 794.011, which discusses sexual battery.[66] Sexual battery by a person in a position of familial or custodial authority has thus even more clearly been made a degree of the basic offense of sexual battery. This would seem to show legislative agreement with the decision in *Thompson* and demonstrate that decision's continued applicability. The supreme court's decision in *Hallberg* will be of even more importance. Various subsections of *Florida Statutes* section 794.011(8) make it a third, first, or life felony, for a "person who is in a position of familial or custodial authority to a person less than 18 years of age"[67] to solicit or actually commit a sexual battery on a minor. Like former section 794.041, section 794.011(8) does not define "in

59. Thus, Hallberg's three convictions for sexual activity with a child by a person in custodial authority were reversed and his case remanded for further proceedings. *Id.* The obvious practical result for Hallberg will be a resentencing where he will most likely receive a substantially shorter sentence.

60. *Id.*

61. *Id.* (citing FLA. STAT. § 794.041(2) (1987)) (emphasis omitted).

62. *Hallberg*, 649 So. 2d at 1360-61.

63. *Id.* at 1358.

64. *Id.*

65. Ch. 93-156, § 4, 1993 Fla. Laws 907, 911.

66. FLA. STAT. § 794.011(8).

67. *Id.*

a position of familial or custodial authority." Thus, *Hallberg* will be looked to for guidance and authority on this subject.

D. *Leaving an Accident Involving Death or Personal Injury*

This year, the Supreme Court of Florida handed down an important decision regarding *Florida Statutes* section 316.027, which discusses accidents involving death or personal injuries. In *State v. Mancuso*,[68] Dennis Mancuso was charged with leaving the scene of an accident involving death or personal injury under section 316.027 of the *Florida Statutes*.[69] Mancuso had allegedly struck two pedestrians in the early morning hours of December 6, 1992. Later that day, he went to the local police department and reported his car had been involved in an accident. Mancuso claimed he did not know his vehicle had hit anything or anyone. Instead, he told the police that his windshield had suddenly cracked while he was driving but that no debris or other signs of an accident were visible when he pulled over to inspect the damage to his car. Mancuso eventually left his car near the scene and walked home. One of the victims died and the other was seriously injured. Therefore, the State criminally charged Mancuso for leaving the scene of an accident involving death or personal injury.

At trial, Mancuso requested that the jury be instructed that the State must prove he knew he was involved in an accident resulting in personal injury to another and then willfully left the scene and willfully failed to aid

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68. 652 So. 2d 370 (Fla. 1995).

69. *Id.* *Florida Statutes* section 316.027(1)(a) states:

> The driver of any vehicle involved in an accident resulting in injury or death of any person shall immediately stop such vehicle at the scene of the accident, or as close thereto as possible, and shall forthwith return to, and in every event shall remain at the scene of, the accident, until he has fulfilled the requirements of s. 316.062.

FLA. STAT. § 316.027(1)(a) (1991).

Subsection (2) provided that any person willfully failing to comply with the requirements of subsection (1) was guilty of a third-degree felony. *Id.* § 316.027(2). *Florida Statutes* section 316.062 requires a driver involved in an accident to stop and exchange certain information and to render aid to persons injured in the accident. FLA. STAT. § 316.062 (Supp. 1994). *Florida Statutes* section 316.027 was amended in 1993. Ch. 93-140, § 1, 1993 Fla. Laws 805, 806. However, the only major change was to make leaving the scene of an accident involving death a second-degree felony. FLA. STAT. § 316.027(1) (1993). Willfully leaving the scene of an accident involving personal injury but not death remains a second-degree felony. FLA. STAT. § 316.027(2) (Supp. 1994).

the victims.[70] The trial court denied this instruction and instead gave an instruction that omitted any requirement concerning knowledge of the injury. The jurors were told that they only had to find Mancuso was involved in an accident resulting in death or injury, that he knew or should have known that he was involved in an accident, and that he willfully failed to stop at the accident scene. Mancuso was convicted of violating section 316.027 and appealed his conviction.

The Fourth District Court of Appeal reversed Mancuso's conviction, because the jury instructions did not contain any instruction on "constructive knowledge" of the death or injury of the victims.[71] The State contended the jurors were properly instructed as they only needed to determine that Mancuso knew, or should have known, that he was involved in an accident and that an injury or death had resulted therefrom. The Fourth District Court of Appeal briefly examined cases from other jurisdictions agreeing with the State's argument that knowledge of the injury is not a separate element which the jury must be instructed upon. The court noted that those decisions involved the interpretation of statutory language significantly different from Florida's. Specifically, the court noted that *Florida Statutes* section 316.027 contains a "willfulness" requirement that these other states' laws did not.[72] Thus, the other states' laws were "strict liability laws" while Florida's was not. Although it found that Mancuso's conviction should be reversed, the district court of appeal certified this issue to the Supreme Court of Florida as one involving a question of great public importance.[73]

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70. The exact instruction Mancuso requested was as follows:

> 3. That Dennis Mancuso knew that he was involved in an accident which resulted in personal injury to another;
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> 4. That Dennis Mancuso, knowing he was in an accident which resulted in personal injury to another:
>
> a. Willfully left the scene; and/or
>
> b. Willfully failed to give . . . [certain information to the others] involved in the accident . . . or to a police officer at the scene. . . .
>
> c. Willfully failed to render aid to any injured person at the scene.

Mancuso v. State, 636 So. 2d 753, 754 (Fla. 4th Dist. Ct. App. 1994), *aff'd*, 652 So. 2d 370 (Fla. 1995). "'Willfully' is defined to mean that Dennis Mancuso intended to leave the scene of an accident knowing it resulted in personal injury to another." *Id.*

71. *Id.* at 754. In so doing, the district court of appeal found that neither the defendant's requested instruction, nor the one the trial court gave, was correct.

72. *Id.* at 756.

73. The exact question certified was as follows: "IN A PROSECUTION FOR VIOLATION OF SECTION 316.027, FLORIDA STATUTES (1991), MUST THE STATE SHOW THAT THE DEFENDANT KNEW OR SHOULD HAVE KNOWN OF THE

In a short, but instructive opinion, the Supreme Court of Florida affirmed the district court's decision.[74] The supreme court first noted that section 316.027 was modeled after the Uniform Vehicle Law.[75] The court also noted that previous Florida decisions construing the section's "willfulness" requirement have held that knowledge of the accident is an essential element under section 316.027.[76] The question presented to the court in this case was whether knowledge of the injury, in addition to knowledge of the accident, was a separate essential element of section 316.027.[77] Since there were no previous Florida decisions on this point, and the court was dealing with a statute modeled after a uniform law, the court looked to decisions in other jurisdictions construing statutes modeled after the same law. In so doing, the court found that most of these decisions had found either that "actual or constructive knowledge of injury"[78] was necessary to make a person criminally liable.

The court in *Mancuso* found two reasons for such an interpretation.[79] First, statutes criminalizing hit-and-runs from personal injury scenes generally impose more severe criminal penalties than those involving hit-and-run incidents involving only property damage.[80] Secondly, the language of section 316.027 requires the driver to take affirmative action.[81] The court found that in fairness before one can be required to act in a certain fashion, the driver must be aware of the facts which give rise to this affirmative statutory duty.[82] Thus, the Supreme Court of Florida held that "criminal liability under section 316.027 requires proof that the driver charged with leaving the scene either knew of the resulting injury or death or reasonably should have known from the nature of the accident and that the jury should be so instructed."[83]

The *Mancuso* decision will have an impact in at least two ways. First, and most importantly, whenever an accused is charged with the same offense in the future, the jury will have to be instructed that knowledge of the death and/or personal injury is required to convict. The supreme court

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INJURY OR DEATH; AND THE JURY BE SO INSTRUCTED?" *Id.*

74. *Mancuso*, 652 So. 2d at 372.
75. *Id.* at 371.
76. *Id. See* Stanfill v. State, 384 So. 2d 141 (Fla. 1980).
77. *Mancuso*, 652 So. 2d at 370-71.
78. *Id.* at 371.
79. *Id.* at 372.
80. *Id.*
81. *Id.*
82. *Mancuso*, 652 So. 2d at 372.
83. *Id.*

did not specify what the exact language of such an instruction should be. Instead, this matter was referred to the Supreme Court Committee on Standard Jury Instructions in Criminal Cases.[84] Second, there will be some reversals in other cases involving charges under section 316.027 where the juries were not instructed about this knowledge requirement.[85]

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84. *Id.* In July 1995, the Committee forwarded the following proposed instruction to the Supreme Court of Florida for its approval:

> Before you can find the defendant guilty of Leaving the scene of an Accident, the state must prove the following five elements beyond a reasonable doubt:
>
> 1. (Defendant) was the driver of a vehicle involved in an accident resulting in [injury to] [death of] any person.
>
> 2. (Defendant) knew or should have known that [he] [she] was involved in an accident.
>
> 3. (Defendant) knew or should have known of the [injury to] [death of] the person.
>
> 4. (Defendant) willfully failed to stop at the scene of the accident or as close to the accident as possible and remain there until [he] [she] had given
>
> a. to the [injured person] [driver] [occupant] or [person attending the vehicle] and
>
> b. to any police officer at the scene of the accident or investigating the accident the following information:
>
> a. [sic] [his] [her] name,
>
> b. [his] [her] address,
>
> c. registration number of vehicle [he] [she] was driving, and license plate number of vehicle [he] [she] was driving, and
>
> d. if available, and requested, the exhibition of [his] [her] license or permit to drive.
>
> 5. (Defendant) willfully failed to render reasonable assistance to the injured person if such treatment appeared to be necessary or was requested by the injured person.
>
> "Reasonable assistance" includes carrying or making arrangements to carry the injured person to a physician, surgeon or hospital for medical or surgical treatment.
>
> "Willfully" means intentionally, knowingly and purposely.

Telephone Conversation with chambers of the Hon. Fredricka Greene Smith, Circuit Court Judge, Eleventh Judicial Circuit, Dade County, Florida (Oct. 6, 1995). However, the court returned the proposed instruction to the Committee for further study. As of October 6, 1995, the Committee had not recommended another proposed instruction.

Judge Smith chaired the Supreme Court Committee on Standard Jury Instructions in Criminal Cases at the time of the supreme court's action.

85. *See, e.g.*, Cordier v. State, 652 So. 2d 505 (Fla. 4th Dist. Ct. App. 1995); Reeves v. State, 647 So. 2d 994 (Fla. 2d Dist. Ct. App. 1994). Both cases were decided during this survey period. In both cases, the district courts reversed convictions under *Florida Statutes* section 316.027, because the jury was not told that knowledge of the death or personal injury

E. *Manslaughter*

Criminal homicide is a general offense often distinguished among its various types and degrees by different gradations of intent. Thus, delineating when certain acts clearly constitute one type and degree of homicide offense from another is sometimes difficult to do. One common definition of manslaughter at common law declared that this offense existed when there was an unlawful killing of one human being by another, without malice aforethought, upon a sudden impulse or heat of passion, and without any legal justification or excuse. The term "malice aforethought" was a legal term of art used to recognize a number of different situations in which a person would be guilty of murder. Absent one of these situations, an unlawful killing would generally be considered a manslaughter.

Florida has retained this notion that manslaughter generally is a lesser included offense of murder. The Supreme Court of Florida has recognized that manslaughter "is a residual offense, defined by reference to what it is not."[86] Thus, the supreme court has consistently required that when an accused is charged with manslaughter or a greater homicide offense not more than one step removed from manslaughter, the jury must also be instructed on what constitutes a justifiable or excusable homicide under Florida law.[87] The need for such instruction on justifiable or excusable

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was an essential element of the offense. *Cordier*, 652 So. 2d at 505; *Reeves*, 647 So. 2d at 995. In each case, the defendants had not objected to the failure of giving such an instruction. However, both decisions found that this did not matter as the failure to instruct a jury concerning an element of a crime charged constitutes fundamental and reversible error. *Cordier*, 652 So. 2d at 505; *Reeves*, 647 So. 2d at 995.

86. Stockton v. State, 544 So. 2d 1006, 1007-08 (Fla. 1989). In this case, the trial court correctly instructed a jury on manslaughter as a lesser included offense of second and third-degree murder. *Id.* at 1007. This original set of jury instructions also included instructions about what would be considered justifiable or excusable homicide. However, when the court reinstructed the jury, at its request, on second and third-degree murder, the trial court on its own also decided to reinstruct on manslaughter but refused defense counsel's request to reinstruct on excusable and/or justifiable homicide. The supreme court found this refusal to be reversible, as "[a]n instruction on manslaughter which omits the definitions of justifiable and excusable homicide is . . . incomplete." *Id.* at 1008.

The court did indicate that if the trial court had limited the reinstruction to the jury's specific requests and had not included its own reinstruction on manslaughter, there would have been no error. *Id.*

87. *See* Hedges v. State, 172 So. 2d 824 (Fla. 1965). However, if defense counsel specifically requests a limited form of the standard instruction on justifiable and excusable homicide and the trial court gives the instruction requested, then the defense has waived its claim to raise on appeal the argument that the instruction as given was erroneous. Armstrong v. State, 579 So. 2d 734, 735 (Fla. 1991). Likewise, it is not fundamental error for the court

homicide is evident from the statutory definition of manslaughter.[88] Despite the supreme court's apparently clear mandate that a complete instruction on manslaughter also requires an instruction as to what constitutes justifiable and/or excusable homicide, Florida's trial courts continue to struggle with this requirement.

The Florida trial courts' continued failure to adequately instruct juries on manslaughter was recently demonstrated by the supreme court's decision in *State v. Lucas*.[89] There, David Lucas was charged with attempted second-degree murder and various other offenses. At his trial, Lucas admitted that the criminal acts had occurred but claimed that he was not the perpetrator. Defense counsel requested, and the trial court gave an instruction on attempted manslaughter as a category one lesser included offense of attempted second-degree murder. Unfortunately, the trial court failed to explain that Lucas could not be convicted of attempted manslaughter if the evidence showed that the attempted homicide was either justified or excused. The defendant did not request such a charge and did not object to the omission. After the jury found him guilty of all charges, Lucas appealed his attempted second-degree murder conviction claiming that the court's exclusion of justifiable and excusable homicide from its definition of attempted manslaughter was fundamental error requiring reversal.

On appeal, the State claimed that the failure to give jury instructions on the definition of justifiable and excusable homicide should not constitute fundamental error which would be per se reversible. The First District Court of Appeal agreed the defense at trial conceded that there was a second-degree murder and only disputed identity.[90] Thus, there really was no factually contested issue regarding attempted manslaughter, justifiable homicide, or excusable homicide. However, the district court found itself bound by earlier supreme court decisions and reversed the attempted second-

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to give a short-form instruction, instead of a long-form instruction, on excusable homicide where there is no objection from the defense. State v. Smith, 573 So. 2d 306, 310 (Fla. 1990).

88. *Florida Statutes* section 782.07 states in part that:

> The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killings shall not be excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter . . . .

FLA. STAT. § 782.07.

89. 645 So. 2d 425 (Fla. 1994).

90. Lucas v. State, 630 So. 2d 597, 598 (Fla. 1st Dist. Ct. App. 1993), *aff'd*, 645 So. 2d 425 (Fla. 1994).

degree murder conviction anyway.[91] The court certified this question to the supreme court as one of great public importance.[92]

Despite the lack of evidence to support a finding of excusable and justifiable homicide, the Supreme Court of Florida found that the failure to give a complete instruction here constituted per se reversible error.[93] In so doing the court appears to hold fast to its bright-line rule regarding the necessity of complete instructions when defining the crime of manslaughter for a jury in Florida. The court held that "failure to give a complete initial instruction on manslaughter constitutes fundamental reversible error when the defendant is convicted of either manslaughter or a greater offense not more than one step removed."[94] The court found only one exception to this requirement, that being the situation where defense counsel has affirmatively agreed to, or even requested, the incomplete instruction.[95]

Lucas will hopefully bring an end to the problem of having homicide cases reversed in Florida due to a trial court's failure to give complete instructions on manslaughter. The moral of the *Lucas* decision for both prosecutors and trial judges is simple. Whenever an accused is charged with manslaughter or a homicide offense one step removed, the jury should always be given correct instructions as to what constitutes justifiable and

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91. *Id.* at 600-01.

92. *Id.* at 600. The question certified to and decided by the supreme court was as follows:

> WHEN A DEFENDANT HAS BEEN CONVICTED OF EITHER MANSLAUGHTER OR A GREATER OFFENSE NOT MORE THAN ONE STEP REMOVED, DOES FAILURE TO EXPLAIN JUSTIFIABLE AND EXCUSABLE HOMICIDE AS PART OF THE MANSLAUGHTER INSTRUCTION ALWAYS CONSTITUTE BOTH 'FUNDAMENTAL' AND PER SE REVERSIBLE ERROR, WHICH MAY BE RAISED FOR THE FIRST TIME ON APPEAL AND MAY NOT BE SUBJECTED TO A HARMLESS-ERROR ANALYSIS, REGARDLESS OF WHETHER THE EVIDENCE COULD SUPPORT A FINDING OF EITHER JUSTIFIABLE OR EXCUSABLE HOMICIDE?

Id.

93. *Lucas*, 645 So. 2d at 427.

94. *Id.*

95. *Id.* The court cited *Armstrong*, for approval of this exception. For a recent case after *Lucas* applying this exception to affirm a second-degree murder conviction, even where no instructions on excusable or justifiable homicide were given, see Abbarno v. State, 654 So. 2d 225 (Fla. 5th Dist. Ct. App. 1995).

Lucas did not indicate that the situation suggested in *Stockton*, where the jury requests reinstruction on second or third-degree murder, and the judge only instructs on these homicide offenses and not on manslaughter, would also be an exception to the general rule in *Lucas*. Thus, the continued viability of *Stockton* is in doubt.

excusable homicide in Florida, even when the evidence would not support such a finding. Prosecutors who follow this simple rule should have no difficulty living with the *Lucas* decision. If the evidence would definitely not support a finding of justifiable or excusable homicide, the instruction will just be superfluous and the jury will merely ignore it. Prosecutors and trial judges will have to be careful of defense "sandbagging" after *Lucas*. The lack of requested instructions or an objection to the lack of instructions about excusable or justifiable homicide made no difference as to the defense's ability to raise the issue on appeal. Thus, defense counsel will no longer feel an urgency to request such instruction. Prosecutors will have to remain constantly alert to make sure manslaughter instructions are appropriately complete.[96]

F. *Felony Offense Reclassification*

Substantive criminal law recognizes that offenses can be committed by a variety of means. Some means used to commit a criminal offense actually or potentially increase the harm, or threat of harm, stemming from the offense committed. Sometimes the substantive criminal law explicitly takes this into account. Thus, when a theft is committed by force or threat of force, the offense becomes a robbery. Likewise, Florida substantive criminal law has long distinguished among various degrees of batteries and assaults, depending upon the means used to perpetrate the offense.[97] However, given the wide variety of crimes existing in Florida, explicitly providing for changes in each individual offense's nature or degree whenever force or threat of force is used would be practically impossible. Instead, to partially alleviate the difficulty of providing a degree increase in each individual of-

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96. The need to remain alert to make sure correct jury instructions are given exists when the jury is reinstructed on a point as well as initially instructed about that matter. Even if counsel points out that initial instructions are erroneous and the court attempts to cure this deficiency, mistakes will sometimes occur.

For a recent case illustrating this point, see Cummings v. State, 648 So. 2d 166 (Fla. 4th Dist. Ct. App. 1994), where counsel drew the trial court's attention to a mistake made in initially instructing the jury about excusable homicide and the trial court erred again, but in a different way, when reinstructing the jurors about excusable homicide. The court noted that the lack of evidence to support excusable homicide made no difference. *Id.* at 168.

97. Thus, simple assault becomes aggravated assault when a deadly weapon is used without the intent to kill. FLA. STAT. § 784.021(1)(a). Likewise, simple battery becomes aggravated battery when a deadly weapon is used. FLA. STAT. § 784.945(1)(a)(2).

Of course the change from an assault to a battery once actual force is used, as opposed to threat of force, is another illustration of how substantive criminal law distinguishes between kinds of offenses due to the harm that actual use of force causes or may cause.

fense's sections, the legislature promulgated a general reclassification statute for most felony offenses when a firearm or weapon is used to perpetrate them.

Florida Statutes section 775.087(1) provides, in part that, when during a felony an accused "carries, displays, uses, threatens, or attempts to use any weapon or firearm, or . . . commits an aggravated battery"[98] the felony is reclassified to the next highest degree. This reclassification section does not apply to felony offenses where the use of a weapon or firearm is an essential element of the crime that the defendant committed.[99] Within the survey period, the Supreme Court of Florida decided two important cases concerning the construction of section 775.087(1).

The first case, *State v. Tripp*,[100] involved the certified question of whether an accused's conviction may be reclassified under section 775.087(1) without the jury explicitly finding that the defendant had a weapon during the commission of the felony involved.[101] Tripp had entered a convenience store and had repeatedly struck the store clerk with a claw hammer. After he was unsuccessful in opening the cash register, he again beat the clerk with the hammer, causing her serious physical injuries. Tripp was charged with aggravated battery with a deadly weapon, robbery with a deadly weapon, and attempted first-degree murder. The charging document specifically alleged that he had a premeditated design to cause the

98. FLA. STAT. § 775.087(1).

99. For a recent Florida case finding upward reclassification of a felony impermissible under *Florida Statutes* section 775.087(1), see McNeal v. State, 653 So. 2d 1122 (Fla. 1st Dist. Ct. App. 1995). The *McNeal* court found that an accused's attempted aggravated battery conviction could not be reclassified from a third-degree to a second-degree felony when the charging document had alleged that the aggravated battery was committed by use of a deadly weapon. *Id.* at 1123. The court acknowledged that use of a deadly weapon was not "an essential element of the offense of aggravated battery in all cases." *Id.* at 1123 (quoting Brown v. State, 583 So. 2d 742 (Fla. 1st Dist Ct. App. 1991)). However, the *McNeal* court found that weapon's use became an essential element of the offense due to the charging document's language. *Id.* at 1124.

100. 642 So. 2d 728 (Fla. 1994).

101. *Id.* at 729. The certified question the supreme court considered was as follows: "MAY A TRIAL COURT RECLASSIFY A FELONY CONVICTION PURSUANT TO SECTION 775.087(1) ABSENT A SPECIFIC FINDING ON THE JURY'S VERDICT FORM THAT A DEFENDANT CARRIED, DISPLAYED, USED, ETC. ANY WEAPON OR FIREARM OR THAT HE COMMITTED AN AGGRAVATED BATTERY DURING THE COMMISSION OF THE FELONY SUBJECT TO RECLASSIFICATION?" *Id.* This certified question was a rephrased version from the one originally certified by the district court of appeal. Tripp v. State, 610 So. 2d 1311, 1313 (Fla. 1st Dist. Ct. App. 1992), *aff'd*, 642 So. 2d 728 (Fla. 1994).

victim's death while involved in a felony, namely the robbery, and did so by attempting to murder her by hitting her in the head with a weapon, the claw hammer. The jury found Tripp guilty of these three offenses. Following his conviction, the State successfully sought to have his offenses reclassified pursuant to section 775.087(1).[102]

The First District Court of Appeal reversed the reclassification of Tripp's first-degree murder and attempted armed robbery convictions.[103] The attempted armed robbery conviction reclassification was reversed, because use of a weapon is an essential element in this offense.[104] As for the attempted first-degree murder charge, the district court agreed with the State's argument that use of the weapon was not an essential element of this offense, thus the offense could be subject to reclassification.[105] The court found that the charging document and the proof at trial supported the determination that both a weapon had been used and an aggravated battery had been committed during the attempted first-degree murder offense.[106] However, the court noted that the verdict form contained no specific jury finding that Tripp had used a deadly weapon or committed an aggravated battery while committing the attempted first-degree murder.[107] Without this explicit jury finding, the district court found that reclassification of the attempted first-degree murder conviction from a first-degree felony to a life felony was improper.[108]

The Supreme Court of Florida, in a short but important opinion, affirmed the First District Court of Appeal's decision.[109] The supreme court noted that the jury had found Tripp guilty of "charges made against him in the Information"[110] and that the information had alleged Tripp used a weapon when committing the attempted first-degree murder. However, the supreme court found that "the jury did not make a sufficient finding that Tripp used a weapon because there was no special verdict form reflecting

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102. This reclassification resulted in the attempted first-degree murder being raised to a life felony, instead of a first-degree felony.

103. *Tripp*, 610 So. 2d at 1313.

104. *Id.* at 1312.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Tripp*, 610 So. 2d at 1313.

109. *Tripp*, 642 So. 2d at 730.

110. *Id.* The supreme court quotes this language in its opinion. However, it is not clear where the wording came from. As this wording does not appear in the First District Court of Appeal opinion, this author assumes that it came from the jury verdict form.

a separate finding to this effect."[111] Since the court considered this question a factual one for the jury, and not for the court to decide, without such a special verdict form, reclassification was improper. Thus, Tripp could only be sentenced for a first-degree felony, not a life felony.

Both the district court and the supreme court relied upon, and noted with approval, the supreme court's earlier decision in *State v. Overfelt*,[112] also involving the proper construction of section 775.087. There, the question was whether there had to be a jury finding that an accused possessed a firearm before the trial court could reclassify a felony pursuant to section 775.087(1).[113] As with *Tripp*, the supreme court had found that this was a factual finding for the jury and not for a trial court.[114] After *Tripp* and *Overfelt*, prosecutors who plan to ask for reclassification of a felony conviction pursuant to section 775.087(1) must make sure that the jury receives special verdict forms or else reclassification will not be possible. Given the *Tripp* and *Overfelt* decisions, all three factors which can enhance a felony reclassification must be submitted to a jury for a specific determination of their presence.[115]

Despite the broad holding in *Tripp*, that whether a defendant used a weapon during the commission of a felony is a jury question, a second recent Supreme Court of Florida case construing section 775.087(1) shows that there are some limits on this decision's scope. In *State v. Houck*,[116] the defendant was accused of banging the victim's head against the pavement, thus causing him serious head injuries which resulted in his death. The State charged the defendant with second-degree murder alleging that the pavement had been used as a weapon to injure the victim's head. The jury instead found the defendant guilty of manslaughter with a weapon. The State sought reclassification under section 775.087(1), and the trial court adjudicated Houck guilty of a first-degree felony. Unlike *Tripp* and *Overfelt*, the jury had apparently been explicitly presented with the specific question whether a weapon was used during the commission of the

111. *Id.*

112. 457 So. 2d 1385 (Fla. 1984).

113. *Id.* at 1386.

114. *Id.* at 1387.

115. Although the charge in *Tripp* only alleges the presence of one of the sentencing enhancing factors of *Florida Statutes* section 775.087(1), the certified question the supreme court answered included all three factors.

116. 652 So. 2d 359 (Fla. 1995).

felony.[117] Thus, if this were purely a jury question as a broad reading of these two cases implies, Houck's conviction and reclassification should have been affirmed. However, that was not the case.

One difficulty with section 775.087(1) is that neither it, nor any section of chapter 775, defines what should be considered a "weapon" for felony reclassification purposes. This problem is not unique to this particular statute. Other sections of the *Florida Criminal Code* using the term "weapon" also lack a specific definition for it. Given the absence of a statutory definition of "weapon" in chapter 775 the supreme court had two apparent choices: adopt the definition of weapon found in chapter 790 as had been done in other cases,[118] or give the word "weapon" its common or ordinary meaning. In this case, both the supreme court and the district court of appeal chose to resort to dictionary definitions for the meaning of "weapon."[119] Something would be considered a weapon if it is commonly used as an "instrument for combat against another person."[120] Pavements are not such instruments. The supreme court rejected the State's argument that whether something was a weapon was a matter for the jury and not for

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117. Neither the district court of appeal's decision nor the supreme court's decision say that the jury was presented with this question via a special jury form. The author infers that this was the situation from the supreme court's opinion which does not mention *Tripp*. The court's failure to cite *Tripp*, decided the same day as *Houck*, indicates that the error which caused reversal there was probably not present in *Houck*. Whether this deduction is correct or not, there would still be the same result in *Houck*, given the supreme court's reasoning for the reversal there.

118. *E.g.*, Arroyo v. State, 564 So. 2d 1153, 1154 (Fla. 4th Dist. Ct. App. 1990) (finding it appropriate to use definitions in chapter 790 to determine what is a "dangerous weapon" for purposes of deciding if an armed burglary has occurred under *Florida Statutes* section 810.02(2)(b)); Gust v. State, 558 So. 2d 450, 452 (Fla. 1st Dist. Ct. App. 1990) (finding it appropriate to look to the definition in chapter 790 of "weapon" to determine when a person commits armed robbery, a first-degree felony, rather than unarmed robbery, a second-degree felony).

In *Houck*, both the district court and the supreme court used means other than looking to chapter 790 for help in deciding what should be considered a weapon under *Florida Statutes* section 775.087(1). *Houck*, 652 So. 2d at 360; Houck v. State, 634 So. 2d 180, 182 (Fla. 5th Dist. Ct. App.), *review granted*, 642 So. 2d 1363 (Fla. 1994). The district court of appeal's decision indicated that even if the definition of "weapon" in section 709.001(13) had been used, there would still have been a reversal of the felony reclassification. *Houck*, 634 So. 2d at 182.

119. The district court used the definition of weapon from Webster's New Collegiate Dictionary. *Houck*, 634 So. 2d at 182. However, the supreme court chose the definition in the American Heritage College Dictionary. *Houck*, 652 So. 2d at 360.

120. *Houck*, 652 So. 2d at 360.

the court.[121] The court found that allowing something as passive as a pavement to be considered a weapon for sentencing enhancement would allow all sorts of objects not otherwise considered inherently dangerous to enhance convictions.[122] Secondly, both the supreme court and the district court of appeal recognized that allowing such a broad definition of weapon might implicitly go against one of the purposes of the felony reclassification statute.[123] Both courts agreed that "the obvious legislative intent reflected by 775.087 is to provide harsher punishment for, and hopefully deter, those persons who use instruments commonly recognized as having the purpose to inflict death and serious bodily injury upon other persons."[124] If virtually anything could be considered a "weapon" under this section, the deterrence value of such a classification scheme would be lowered, as most felonies would automatically be subject to reclassification.[125]

Is *Houck* in conflict with *Tripp* and *Overfelt*? If *Tripp* is read broadly, conflict between the two supreme court decisions is inevitable. However, another reading of *Tripp* shows that no conflict exists. Under *Houck* whether something can be considered a weapon, as a matter of law, remains for the court to decide. However, under *Tripp* and *Overfelt*, whether something can be legally considered a weapon for purposes of section 775.087(1) when used during the commission of a felony is a factual matter for jury consideration. Read this way, there is no conflict between the two decisions.[126]

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121. *Id.*

122. *Id.*

123. *Id.*; *Houck*, 634 So. 2d at 184.

124. *Houck*, 652 So. 2d at 360 (quoting *Houck*, 634 So. 2d at 184).

125. If the State's argument had been accepted, the deterrence value of *Florida Statutes* section 775.087(1) would be lowered in another way. Deterrence assumes that persons to be deterred have some knowledge or likelihood of knowledge of what it is they are hopefully being deterred from doing. If "weapon" is given its common meaning, then an ordinary person knows what he is being deterred from using. If what is a "weapon" is left totally and completely up to a jury, an ordinary citizen can never know when harsher punishment is likely.

126. The supreme court would obviously not want to render conflicting decisions construing the same statute. When one remembers this fact, plus the fact that the decisions were rendered the same day, this strongly suggests that there is no conflict between the two opinions. Furthermore, *Houck* may not really have as broad an effect on the state's ability to enhance felony convictions as one would expect. The Fifth District Court of Appeal noted that the state had passed up another way to possibly have Houck's conviction reclassified under *Florida Statutes* section 775.087(1). *Houck*, 634 So. 2d at 184. The court noted that the state might have been able to prove Houck committed an aggravated battery during the homicide. *Id.* at 183. The Fifth District Court of Appeal implies that this would have been

G. *Attempted Felony Murder*

Perhaps no part of homicide law has generated more controversy than the felony murder doctrine. The doctrine is based upon the belief that when a defendant commits or attempts to commit a felony during or immediately after which a homicide occurs, the felon should also be held liable for the homicide as well as the underlying felony. The purpose of the felony murder doctrine is twofold: 1) to deter potential felons from committing the underlying felony in the first place; and 2) to urge felons who commit felonies to commit them in the least dangerous fashion. In Florida, a felony murder will be either first, second, or third-degree murder depending upon the underlying felony[127] and upon who the person is who actually does the killing.[128] The intent necessary for the killing is supplied through the legal fiction of the homicide occurring during the course of the underlying felony.

Twice within the last fifteen years, the Supreme Court of Florida has affirmed the notion that there is a crime of attempted felony murder. In *Fleming v. State*,[129] the court upheld the validity of the accused's guilty plea to attempted first-degree felony murder for the shooting of a police officer. The defendant had asserted that there could be no factual basis for his plea because the officer was accidentally shot during a struggle for the defendant's gun. The supreme court rejected that notion finding that the inchoate crime of attempt consists of two essential elements: "(1) a specific intent to commit the crime, and (2) a separate overt, ineffectual act done toward its commission."[130] Although the first requirement would seem to have required the specific intent for a death to result, the *Fleming* court

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a proper basis for reclassification. *Id.* The supreme court's opinion does not discuss this suggestion. One issue arising under the district court's suggestion is whether aggravated battery would be considered a lesser included offense of manslaughter, and if so, would enhancement still be possible under *Florida Statutes* section 775.087(1) or would double jeopardy prohibit this?

127. When the homicide is committed by someone perpetrating or attempting any one of thirteen statutorily enumerated felonies, then a first-degree felony murder has been committed. FLA. STAT. § 782.04(1)(a)(2) (1994). When the homicide is committed by someone perpetrating or attempting any felony other than one of the thirteen statutorily enumerated felonies, then the homicide is a third-degree felony murder. *Id.* § 782.04(4).

128. When someone other than a person engaged in perpetrating or attempting one of thirteen statutorily enumerated felonies actually commits the homicide, the felony murder is a second-degree felony. *Id.* § 782.04(3).

129. 374 So. 2d 954 (Fla. 1979).

130. *Id.* at 955 (citing Hutchinson v. State, 315 So. 2d 546 (Fla. 2d Dist. Ct. App. 1975); Robinson v. State, 263 So. 2d 595 (Fla. 3d Dist. Ct. App. 1972); Grouneau v. State, 201 So. 2d 599 (Fla. 4th Dist. Ct. App. 1967)).

noted that under the felony murder doctrine, unlike in other homicide offenses, "[s]tate of mind is immaterial for the felony is said to supply the intent."[131] The *Fleming* court held that there is such a crime as attempted felony murder in Florida based upon the finding that "where the alleged "attempt' occurs during the commission of a felony . . . the law presumes the existence of premeditation, just as it does under the felony murder rule."[132]

Five years after *Fleming*, in *Amlotte v. State*,[133] the Supreme Court of Florida reaffirmed that there is such a crime as attempted felony murder in Florida.[134] Relying in part on its decision in *Fleming*, the *Amlotte* court described the essential elements of attempted felony murder as: 1) attempt to perpetrate an enumerated felony; and 2) an intentional overt act, or the aiding or abetting of such an act, which could, but does not cause the death of another.[135] Under the *Amlotte* two-part definition, it would be easy to discern whether there was an attempt to perpetrate or an actual perpetration of an enumerated felony. Instead, the more difficult question is whether there has been a sufficient overt act toward the commission of a felony which could, but does not, cause the death of another. Thus, under the attempted felony murder doctrine, the key issue is discerning which acts could have caused the death of another but did not.

Recently, in a short but major opinion, the Supreme Court of Florida in *State v. Gray*[136] receded from its holdings in *Amlotte* and *Fleming* and found that the crime of attempted felony murder does not exist.[137] In *Gray*, the defendant and two codefendants robbed a restaurant and fled in a car. During a chase with the police, the car's driver went through a red light and hit another car. The other car's driver was ejected and seriously injured. Gray was convicted of the underlying robbery offense and of attempted felony murder. On appeal, Gray questioned whether there was a separate overt act which could, but did not, cause the death of another. The Third District Court of Appeal found that the State had presented insufficient evidence to present a jury question of whether the alleged overt act of

131. *Id.* at 956 n.1.

132. *Id.* at 956 (citing Knight v. State, 338 So. 2d 201 (Fla. 1976); Adams v. State, 341 So. 2d 765 (Fla. 1976)).

133. 456 So. 2d 448 (Fla. 1984).

134. *Id.* at 449.

135. *Id.* at 449-50.

136. 654 So. 2d 552 (Fla. 1995).

137. *Id.* at 552-53.

running a red light could have caused the victim's death.[138] As a result, the court reversed Gray's conviction for the crime of attempted felony murder.[139] However, the District Court of Appeal certified the question of whether there was a sufficient overt act which could have caused the death of another.[140]

In a surprising decision, the supreme court did not answer the certified question but instead receded from its holding in *Amlotte* and held that there was no such crime as attempted felony murder at all.[141] Instead, the court agreed with Justice Overton's dissent in *Amlotte*, which reasoned that attempted felony murder is a logical impossibility.[142] The court recognized that under Florida substantive law, an attempt requires that there be proof of a specific intent to commit a specific crime.[143] The court reasoned that since felony murder is based upon a legal fiction that supplies the malice necessary through the commission of the underlying felony, attempting to commit such a crime is logically impossible.[144]

Gray is certainly a major case with a significant effect. Under the felony murder doctrine, as applied in Florida, some of the harshest consequences were possible. Unlike other jurisdictions which had recognized limits upon the application of the felony murder doctrine,[145]

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138. *Id.* at 553.

139. *Id.*

140. The exact question certified was as follows: "WHETHER THE 'OVERT ACT' REFERRED TO IN AMLOTTE v. STATE, 456 So. 2d 448, 449 (Fla. 1984), INCLUDES ONE, SUCH AS FLEEING, WHICH IS INTENTIONALLY COMMITTED BUT IS NOT INTENDED TO KILL OR INJURE ANOTHER?" *Id.* at 552.

141. *Gray*, 654 So.2d at 554.

142. *Id.* at 553.

143. *Id.* (citing *Amlotte*, 456 So. 2d at 450 (Overton, J., dissenting)).

144. *Id.* (citing *Amlotte*, 456 So. 2d at 450-51 (Overton, J., dissenting)).

145. *E.g.*, People v. Washington, 402 P.2d 130 (Cal. 1965), where the Supreme Court of California refused to extend the felony murder doctrine to a situation where an accomplice had been killed by an intended victim during the course of a robbery. *Id.* at 133-34. The court's opinion rests partially on two theories which were used to limit the felony murder rule. The first theory is the "protected persons" rule. Under this rule, the felony murder doctrine only exists to protect the innocent, not felons; so that if a co-felon is killed, the doctrine should not be used to prosecute the remaining felons for the death of someone who was not intended to be "protected" to begin with. The second theory is the agency theory. Under this theory, only when the act of killing is actually performed by the accused or a co-felon should the doctrine apply. Here, since the victim could not in any way be considered the agent of the remaining felon, the felon could not be prosecuted for the victim's actions resulting in the one robber's death. *Id.*

At least one state has "limited" the felony murder doctrine by abolishing it completely. People v. Aaron, 299 N.W.2d 304 (Mich. 1980).

Florida applied the felony murder doctrine not only to acts of co-felons but also to the acts of police officers and/or bystanders if these acts resulted in death. Florida appeared to follow the per se application of the felony murder doctrine. Thus, whenever a homicide occurred during a statutorily enumerated felony, all felons were most likely to be considered to be guilty of murder, no matter who caused the death or who the victim was.[146] Since the statutory definition of many crimes extend the life of the underlying felony to the flight stage,[147] use of the felony murder doctrine as a vehicle to prosecute for homicide can be extremely widespread. Use of the felony murder doctrine to prosecute felons and co-felons for attempted felony murder, when death did not occur, also had potentially great consequences. Thus, under *Gray* abrogation of the crime of attempted felony murder will greatly lessen the potential harshness of the felony murder doctrine itself.[148] Moreover, the courts will not be required to decide the question of which overt acts could result in death.[149]

H. *Voluntary Intoxication and Mental Disease*

Florida criminal law recognizes a number of defenses not explicitly noted in the *Florida Statutes*. Two of these defenses are voluntary intoxication and insanity. Under Florida criminal law, an accused charged

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146. For example, under Florida law, aiders and abettors of the underlying felony could be guilty of felony murder when the killing was done by one of their accomplices during the felony even if the accused was not present at the time. *E.g.*, Christie v. State, 652 So. 2d 932 (Fla. 4th Dist. Ct. App. 1995). Also, the killer does not have to be the accused or an accomplice. Even a killing resulting from a bystander's acts can support a felony murder conviction. *See* Currelly v. State, 644 So. 2d 139 (Fla. 2d Dist. Ct. App. 1994).

147. See, Parker v. State, 641 So. 2d 369, 378 (Fla. 1994), wherein the supreme court upheld the defendant's felony murder conviction that occurred during flight from a robbery. The court stated that "[t]here is no merit to . . . [the] claim that a killing during flight from the commission of a felony is not felony murder." *Id.* at 376.

148. For example, after *Gray*, several Florida courts had either vacated convictions for attempted felony murder or noted in their opinions that such a crime no longer exists in Florida. *E.g.*, State v. Grinage, 656 So. 2d 457 (Fla. 1995); Ward v. State, 655 So. 2d 1290 (Fla. 5th Dist. Ct. App. 1995).

149. Thus, the supreme court in *Grinage* did not have to decide the certified question about whether certain acts alleged in the charge were sufficient predicates for an attempted felony murder conviction, as the crime no longer exists in Florida. *Grinage*, 656 So. 2d at 458.

For a recent article praising the *Gray* decision but cautioning that "it is too early to ascertain whether *Gray* will result in a major shift away from the application of the felony-murder doctrine" see J. Rafael Rodriguez, *Attempted Felony Murder - An Improbable Legal Fiction Meets Its Demise*, 69 FLA. BAR J. 63, 65 (1995).

with a specific intent defense, should be found not guilty if the accused's voluntary intoxication negated the ability to form the specific intent needed for the crime. As for the insanity defense, Florida follows the McNaghten rule. Under this rule, at the time of the act or acts alleged, the accused must be suffering from such a mental disease or defect as to not know the nature and quality of the act done or to not know that what was done was wrong. Both defenses have been very strictly construed. Mere intoxication alone is not a defense unless it would negate the ability to form specific intent needed for a crime. Likewise, having a mental disease or defect alone is not enough unless it precludes the accused's ability to know what he was doing or to know that what he was doing was wrong. Florida has explicitly rejected the defense of diminished capacity although it is recognized in other jurisdictions.[150]

In *State v. Bias*[151] the supreme court was presented with the interesting question of what happens when a person who raises the defense of voluntary intoxication also has a mental disease or defect. Bias was charged and convicted of first-degree murder and robbery. At trial, Bias raised the defense of voluntary intoxication alleging that he had consumed eleven beers before the commission of his crimes. Bias sought to have psychiatric testimony from a forensic psychiatrist and a forensic psychologist that, in their opinion, Bias was too intoxicated to form the specific intent needed when the crimes occurred. Both experts would have relied on the fact that Bias was suffering from schizophrenia and had brain damage. They claimed that it was necessary to consider an individual's underlying psychiatric or psychological condition when forming an opinion about how intoxicated that person would become after consuming a given amount of alcohol. The psychiatrist contended that the alcohol would have a more dramatic effect

150. Chestnut v. State, 538 So. 2d 820 (Fla. 1989). The defense of diminished capacity allows an accused to offer evidence of any mental abnormality to show that the defendant could or did not have the specific intent needed for the crime charged. Under this defense, if the crime the accused is charged with has a lesser included offense not requiring the same mens rea level as the crime charged, the accused can still be guilty of this crime. If the specific intent crime charged did not have a lesser included offense or had one which was also a specific intent crime, the accused would theoretically be acquitted. Sometimes the diminished capacity defense is termed partial responsibility or partial insanity. For a short, but detailed discussion of this defense, see WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 4.7 (2d ed. 1986).

151. 653 So. 2d 380 (Fla. 1995).

on someone who was schizophrenic or had brain damage.[152] However, the State objected to this testimony claiming that this was nothing more than the defense of diminished capacity and that a person would have to claim insanity before any testimony about schizophrenia would be relevant. The trial court agreed with this objection and the experts then testified they could not give an opinion as to Bias's intoxication without also considering his schizophrenia. Thus, their testimony was precluded. The district court of appeal found that there was sufficient evidence to sustain Bias's convictions.[153] However, the court found that the trial court had erred in precluding the expert testimony pertaining to his voluntary intoxication defense.[154] The district court of appeal certified the question of whether exclusion of the experts' testimony in this case was appropriate to the supreme court as one of great public importance.[155]

The supreme court agreed with the lower court's reversal of Bias's conviction, and set forth specific guidelines for handling situations such as these.[156] The *Bias* court found that when a defendant who raises the defense of voluntary intoxication also has a mental disease or defect, the trial court cannot exclude expert testimony about the combined effect of the alleged mental disease and intoxication on the accused's ability to form a specific intent if an expert cannot adequately express an opinion about the defendant's intoxication without explaining that one of the factors used to form the opinion is the defendant's mental disease.[157] However, the supreme court put three limitations on its holding to ensure that voluntary intoxication defenses do not become diminished capacity defenses in disguised forms. First, the court declared that "the focus of the expert's testimony must be upon the defendant's intoxication, and the mental disease or mental defect must not be the feature of the testimony."[158] Secondly, the mental disease or defect alleged must be one "recognized by authorities generally accepted in medicine, psychiatry, or psychology."[159] Third, the

152. Bias v. State, 634 So. 2d 1120, 1121 (Fla. 2d Dist. Ct. App. 1994), *aff'd*, 653 So. 2d 380 (Fla. 1995). This psychiatrist also would have testified that he believed Bias had used alcohol as a form of self-medication, since schizophrenics commonly did this. *Id.* The expert would also have testified that this aggravates the psychotic symptoms, rather than helping them. *Id.*

153. *Id.*

154. *Id.*

155. *Bias*, 634 So. 2d at 1121.

156. *Bias*, 653 So. 2d at 382.

157. *Id.*

158. *Id.*

159. *Id.*

trial court must make a preliminary determination that the proffered expert opinion about intoxication from the combination of the intoxicants and the recognized mental disease or defect is also "based upon authorities, studies, and experience which have general acceptance in medicine, psychiatry, psychology, or toxicology."[160]

The first limitation is clearly geared to making sure that a voluntary intoxication defense does not become that of diminished capacity. The second two requirements are consistent with Florida's approach to expert testimony in other areas. Florida has long followed the *Frye*[161] test for the admissibility of expert testimony.[162] Unlike the recent decision of the Supreme Court of the United States regarding admissibility of novel scientific evidence and testimony under the *Federal Rules of Evidence*,[163] the *Frye* test requires that the expert testimony being proffered must be generally accepted in a relevant scientific field or fields.[164] Without such, the testimony is inadmissible even though it may be the personal opinion of the expert involved. The general acceptance needed to support an expert's testimony can be found in published studies, text and reports.

Although *Bias* is clearly a conservative opinion, the court's holding should be considered clearly correct. All individuals are not the same, and intoxicants will affect different people in different ways. A person who already suffers from a mental disease or defect is more likely to have his/her mind affected by intoxicants than a person who does not have such a defect. By limiting its holdings to factual situations where there is a recognized mental disease or defect, the Supreme Court of Florida has attempted to ensure that claims purporting that a less intelligent person would be more easily affected by intoxicants than a more intelligent person will not be raised. Also, the effect of the mental disease or defect on the allegedly intoxicated person must be generally recognized by some respected scientific authorities. Personal opinion of an expert alone is not enough. Thus, while the Supreme Court of Florida recognized "that an expert may need to explain why a certain quantity of intoxicants causes intoxication in the

160. *Id.*

161. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

162. *E.g.*, Kaminiski v. State, 63 So. 2d 339 (Fla. 1952).

163. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993). In Flanagan v. State, 625 So. 2d 827, 829 n.2 (Fla. 1993), the court rejected the more lenient approach to the admissibility of scientific evidence as established in *Daubert*, and reaffirmed its commitment to the more traditional approach as set forth in *Frye*.

164. During this survey period, the Supreme Court of Florida handed down a major evidence decision discussing a four-step approach to admission of novel scientific testimony under *Frye*. Ramirez v. State, 651 So. 2d 1164 (Fla. 1995).

defendant whereas it would not in other individuals,"[165] the limitations under *Bias* should ensure that this situation will not lead to a free for all exposing factors about the individual that would, in effect, resurrect the defense of diminished capacity.

Two important issues were not considered in *Bias*. The defense in *Bias* was voluntary intoxication and the question was the effect of the accused's mental disease or defect upon his potential level of intoxication, but what if the defense was insanity? Would evidence of a defendant's intoxication be admissible to support the claim that this person suffering from a mental disease or defect did not know, at that particular time, what he was doing, or that what he was doing was wrong? Moreover, what if both defenses were raised at trial? *Bias* holds that the jury could properly consider evidence of the mental disease or defect on the voluntary intoxication defense. Could the jury similarly consider evidence of the intoxication on the ability to form the requisite knowledge of right from wrong or knowledge that what the person was doing was wrong? And if not, then how can a jury be expected to block out evidence of intoxication when discussing the insanity defense and then consider evidence of a mental disease or defect when considering intoxication?[166] Neither of these questions were answered in the *Bias* opinion.

Looking at these questions, perhaps what the *Bias* decision shows is how difficult it is to limit the scope of expert opinion when defenses like voluntary intoxication and insanity are raised. If the Supreme Court of Florida should find, in a case where the insanity defense is raised, that the defendant's level of intoxication is relevant to that question, then the voluntary intoxication defense could be surreptitiously resurrected for certain defenses for which it is not currently available.[167] Clearly these questions

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165. *Bias*, 653 So. 2d at 383.

166. Theoretically, one way to do this would be with detailed, carefully crafted jury instructions. Yet, many lawyers would argue that juries cannot be expected to compartmentalize their thinking to such a degree when deliberating.

167. For example, since arson is considered a general rather than a specific intent crime, voluntary intoxication is not available as a defense to arson charges. *See generally* Linehan v. State, 476 So. 2d 1262 (Fla. 1985). However, insanity should still be available as a defense here.

For an article discussing the district court's opinion in Linehan v. State, 442 So. 2d 244 (Fla. 2d Dist. Ct. App. 1983), which also held that arson was a general intent crime, see James H. Peterson, III, Note, *The Voluntary Intoxication Defense in Florida: A Question of Intent*, 13 STETSON L. REV. 649 (1984). This article provides helpful background regarding the voluntary intoxication defense in Florida.

are important issues which the Supreme Court of Florida will ultimately have to address.

III. CONSTITUTIONAL CHALLENGES TO FLORIDA CRIMINAL LAWS

A. *Vagueness*

During this survey period, several Supreme Court of Florida opinions have addressed due process challenges to Florida criminal statutes based upon allegedly vague language.[168] Criminal statutes must give a reasonable person sufficient notice of what conduct is likely to be proscribed. Such notice is required for a number of reasons. First, the criminal law expects that citizens will conform their conduct so as to avoid violating the law. Without knowing exactly what conduct violates the law, reasonable people cannot possibly be expected to govern their actions or inactions accordingly. Second, vague statutes allow the police undue freedom to interpret what actions violate the law. This potentially allows the police to arrest, search and charge citizens in an inconsistent and potentially discriminatory manner. Third, if the statute is so vague that the conduct which violates it is unclear, citizens can find themselves being charged at the whim of a prosecutor. Finally, without sufficient standards as to what conduct violates a statute, jury decision-making as to when individuals are guilty of violating the criminal laws is not likely to be sufficiently consistent to merit the public's confidence. Thus, vague statutes are general risks to the rights of individual citizens and to the confidence of the general public in the criminal system. The individual Supreme Court of Florida cases addressing challenges to *Florida Statutes* based on vagueness are discussed below.

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168. In addition to these supreme court cases which discuss vagueness challenges to some of Florida's criminal statutes, a number of district court of appeal decisions have also dealt with vagueness challenges. No doubt by the end of next year's survey period, the supreme court will also have rendered decisions in some of these same cases.

For further discussion on Florida caselaw concerning the issue of vagueness, see generally State v. Bley, 652 So. 2d 1159 (Fla. 2d Dist. Ct. App. 1995); State v. Mitchell, 652 So. 2d 473 (Fla. 2d Dist. Ct. App. 1995); State v. Sailer, 645 So. 2d 1114 (Fla. 3d Dist. Ct. App. 1994); Habie v. Krischer, 642 So. 2d 138 (Fla. 4th Dist. Ct. App. 1994), *review denied,* 651 So. 2d 1194 (Fla.), *and cert. denied,* 115 S. Ct. 2003 (1995); Newberger v. State, 641 So. 2d 419 (Fla. 2d Dist. Ct. App. 1994).

1. Open House Parties

In *State v. Manfredonia*,[169] the Supreme Court of Florida considered arguments that *Florida Statutes* section 856.015(2), concerning open house parties, was unconstitutionally void for vagueness. Under subsection (2) of the statute, it is a second degree misdemeanor for an adult, in control of an open house party, to allow the party to continue where the adult knows that a minor is in possession of drugs or is consuming alcohol or drugs, and the adult fails to take reasonable steps to prevent such.[170] The statute defines such terms as "drug," "open house party," and "residence;" however, the statute does not provide a definition or explanation of what would constitute "reasonable steps" in the prevention of the possession or consumption of the alcoholic beverage or drug.[171] Based on the vagueness of the statute's terms the appellants in *Manfredonia* claimed that section 856.015(2) was unconstitutionally vague and should be stricken.[172] *Manfredonia* was not the first time that a constitutional challenge had been made to section 856.015. In an early case, *State v. Alves*,[173] the Fifth District Court of Appeal had found the same section to be unconstitutionally vague.[174] Although the *Alves* court had recognized that other Florida statutes incorporating a reasonableness standard had been found constitutional, the Fifth District Court of Appeal found that such a standard would only be constitutional when more specific directives were impossible.[175] Consequently, the *Alves* court found that "[t]he actions that are available to an observing adult in control of a residence [where the forbidden action is occurring] are not numerous and can be selected by the legislature rather than imposing criminal sanctions upon one who is placed in a position of

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169. 649 So. 2d 1388 (Fla. 1995).

170. FLA. STAT. § 856.015(2) (1991). The language of *Florida Statutes* section 856.015(2) reads as follows:

> No adult having control of any residence shall allow an open house party to take place at said residence if any alcoholic beverage or drug is possessed or consumed at said residence by any minor where the adult knows that an alcoholic beverage or drug is in the possession of or being consumed by a minor at said residence and where the adult fails to take reasonable steps to prevent the possession or consumption of the alcoholic beverage or drug.

Id.

171. *Manfredonia*, 649 So. 2d at 1389 n.1 (citing FLA. STAT. § 856.015(1) (1991)).

172. *Id.* at 1389.

173. 610 So. 2d 591 (Fla. 5th Dist. Ct. App. 1992).

174. *Id.* at 594.

175. *Id.*

guessing what is reasonable."[176] The *Alves* court found the legislature so obligated and declared that its failure to provide guidelines in section 856.015(2) made the statute unconstitutionally vague.[177]

In addressing the question of whether section 856.015(2) was unconstitutional in *Manfredonia*, the Supreme Court of Florida agreed that the section "is not a paragon of legislative drafting."[178] However, looking to Supreme Court of the United States decisions discussing vagueness of criminal statutes, the supreme court found that mere lack of precision alone would not offend due process.[179] The *Manfredonia* court found that all the Supreme Court of the United States required was that a statute's language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . ."[180] The court found that section 856.015(2) gave such definite warnings. Analyzing this section's elements, the Supreme Court of Florida found that to secure a conviction, four elements must be satisfied:

> 1) An adult controlling certain premises must know there is a social gathering there; 2) a minor must possess or consume alcohol or controlled substances during this gathering; 3) the adult must have actual knowledge of the minor's acts; and 4) the adult in control must both (a) allow the party to continue and (b) fail to take any reasonable steps to prevent the possession or consumption.[181]

According to the Supreme Court of Florida, these requirements put a heavy burden on the state to prove that the adult in charge took no steps whatsoever to prevent the consumption or possession of the alcohol or drugs.[182] The court suggested that an adult controlling such a party could avoid criminal charges by simply stopping the party or taking some other reasonable action to prevent the consumption or possession after learning

176. *Id.*
177. *Id.*
178. *Manfredonia*, 649 So. 2d at 1390.
179. *Id.*
180. *Id.* (citing Roth v. United States, 354 U.S. 476, 491-92 (1957)).
181. *Id.*
182. *Id.*

thereof.[183] Unfortunately, the *Manfredonia* decision did not give any concrete examples of what would constitute reasonable action.[184]

2. Exploitation of Aged Persons or Disabled Adults

In *Cuda v. State*,[185] the Supreme Court of Florida sustained a vagueness challenge to former *Florida Statutes* section 415.111(5) which prohibited the exploitation for profit of a disabled person or adult.[186] This section made it a third-degree felony for anyone to exploit an aged or disabled adult "by the improper or illegal use or management" of such person's property.[187] The accused had been charged with one count of exploitation of an aged person for profit. At the trial court level, Cuda successfully argued that the words "improper or illegal" were unconstitutionally vague. The Fifth District Court of Appeal agreed that the word "improper" did not provide sufficient warning of the prohibited conduct and was unconstitutionally vague.[188] However, the court found that the use of the word "illegal" was specific enough to satisfy constitutional standards.[189] The Supreme Court of Florida, in a short but important decision, reversed the appellate court's decision and agreed that the term "illegal" was also vague, thus making the entire subsection unconstitutionally vague.[190]

In reaching this conclusion, the supreme court had to distinguish between two earlier cases in which it held similar language to be constitutional. In *State v. Rodriguez*,[191] the court had upheld a statute which contained a proscription against acts "not authorized by law."[192] *Florida Statutes* section 409.325(2)(a) criminalized certain acts regarding the food

183. *Manfredonia*, 649 So. 2d at 1391.

184. *Id.* The *Manfredonia* court also declined to comment on whether the appellants' actions, which were not mentioned in either the district court or supreme court opinion, violated *Florida Statutes* section 856.015(2) (1991). *Id.*

185. 639 So. 2d 22 (Fla. 1994).

186. *Id.* at 25.

187. *Florida Statutes* section 415.111(5) reads as follows: "A person who knowingly or willfully exploits an aged person or disabled adult by the improper or illegal use or management of the funds, assets, property, power of attorney, or guardianship of such aged person or disabled adult for profit, commits a felony of the third degree . . . ." FLA. STAT. § 415.111(5) (1991).

188. State v. Cuda, 622 So. 2d 502, 504 (Fla. 5th Dist. Ct. App.), *review granted,* 626 So. 2d 204 (Fla. 1993), *and quashed by* 639 So. 2d 22 (Fla. 1994).

189. *Id.* at 504-05.

190. *Cuda*, 639 So. 2d at 23-24.

191. 365 So. 2d 157 (Fla. 1978).

192. *Id.* at 160.

stamps program when the acts done were "not authorized by law."[193] Despite such broad language, the supreme court found that because of the program's peculiar nature and because chapter 409 itself gave notice that there were federal regulations governing the program, these words actually meant "not authorized by state and federal food stamp law."[194] Thus, the court felt that constitutional notice problems were alleviated when this particular section was read in conjunction with the rest of the chapter. However, in *Locklin v. Pridgeon*,[195] the supreme court had struck down a statute containing the exact same language. Former *Florida Statutes* section 839.22 made it unlawful for any officer of the federal government to "commit any act under color of authority . . . [of their position] when such act is not authorized by law . . . ."[196] This statute was considered unconstitutionally vague, because it required every governmental employee to determine what acts where authorized by law and what acts were not authorized by law.[197] Failure to do so could result in a criminal offense. The "law" in *Locklin* was not limited to an narrow area, like the "law" in *Rodriguez*. Thus, people could mean any and all laws, civil or criminal. Even if a public officer violated a law in good faith, he could be prosecuted. Thus, one could never know how to govern their conduct in order to avoid violating the section without having all encompassing knowledge of all the laws—something which was definitely an impossible task.[198]

The Supreme Court of Florida found that the statute in *Cuda* was more like the unconstitutional one in *Locklin* than the one upheld in *Rodriguez*.[199] The *Rodriguez* case's statute had the federal laws as a back drop, thus providing the needed notice to make the statute constitutional. However, in *Locklin*, section 415.111(5) had no specific laws as a back drop. Instead, the statute criminalized any "illegal" act in using or

193. *Rodriguez* dealt with a challenge to *Florida Statutes* section 409.325(2)(a) (Supp. 1976). *Id.* at 158. Present *Florida Statutes* section 409.325(2)(a) still contains this challenged statutory language. FLA. STAT. § 409.325(2)(a) (1994).

194. *Rodriguez*, 365 So. 2d at 159.

195. 30 So. 2d 102 (1947).

196. *Id.* at 103 (citing FLA. STAT. § 839.22 (1945)).

197. *Id.*

198. The court did not specifically note this as the reason for finding the section constitutionally infirm, but its opinion implies this was so. There also appears to be another vagueness problem with the section. Did "law" mean Florida law, federal law, or any state's law? The section did not make this clear.

199. *Cuda*, 639 So. 2d at 23-24.

managing the funds of a criminal person. This statute was thus found too vague to give sufficient notice of the prohibited conduct involved.[200]

The Supreme Court of Florida did suggest methods for drafting a similar statute so that challenges to its constitutionality could be avoided. First, the court noted that there were at least seven other states with similar statutes to those in Florida.[201] However, it also noted that none of the statutes which were worded similar to Florida's statute inflicted criminal sanctions.[202] One state, Illinois, did impose criminal sanctions for financial exploitation of the elderly.[203] However, the Illinois statute was quite specific in defining the conduct prohibited. This statute made it a crime when a person "knowingly and by deception or intimidation obtains control over the elderly or disabled person's property with the intent to permanently deprive . . . [that person] of his property."[204] The statute specifically defined what constituted "intimidation" and "deception."[205] Additionally, the Illinois statute provided that someone who made a good faith effort to manage an elderly or disabled person's property could not be subject to criminal liability under this law.[206] The Supreme Court of Florida noted that in contrast to the Illinois law, Florida's law "contains no clear explanation of the proscribed conduct, no explicit definition of terms, nor any good faith defense."[207] Thus, this statute was unconstitutionally vague.[208]

Perhaps the most interesting aspect of this discussion was the supreme court's criticism of section 415.111(5) for its failure to provide a good faith defense. The court seems to be clearly suggesting that any such law, to be constitutional, must contain a specific, instead of a general, intent requirement.[209] Evidently, without such a requirement, the Supreme Court of Florida feared that such a criminal provision would be a strict liability law. Thus, a guardian who failed to manage the funds of a disabled person in a

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200. *Id.* at 24.

201. *Id.*

202. *Id.*

203. *See id.* (citing ILL. ANN. STAT. ch. 720, (Smith-Hurd 1993)).

204. *Cuda*, 639 So. 2d at 24 n.3 (citing ILL. ANN. STAT. ch. 720, para. 5/16-1.3 (Smith-Hurd 1993)).

205. *Id.* at 24.

206. *Id.* at 24-25.

207. *Id.* at 25.

208. *Id.*

209. *Cuda*, 639 So. 2d at 23. The Illinois law not only contained a statutory "good faith" exemption, but it also was clearly a specific intent law as it required "the intent to permanently deprive." *Id.* at 24 n.3.

manner required by law could find him or herself criminally liable even though there was no intent to injure the ward in any manner. Clearly, the intent of this law seems to protect elderly or disabled persons from intentional financial abuse by their guardians or other individuals in charge of them or their property. One of the statute's obvious goals is to protect elderly or disabled persons against the theft or deprivation of their property. Thus, in a way, former section 415.111(5) could be viewed as a special kind of theft statute. The Supreme Court of the United States has previously held that statutes comparable to common law theft crimes must contain a specific intent requirement in order to be constitutional.[210] Although the Supreme Court of Florida does not say this explicitly in *Cuda*, any legislative attempt to rewrite section 415.111(5) would be wise to contain such a requirement.

During the 1995 legislative session, the Florida Legislature attempted to deal with the effects of this decision. The legislature first repealed the language in section 415.111(5) which was found unconstitutional in *Cuda*.[211] The legislature then created a new chapter, chapter 825, to address the problems found in *Cuda*.[212] New *Florida Statutes* section 825.103(1)(a) makes it a crime for anyone who "[s]tands in a position of trust and confidence, or has a business relationship, with the elderly person or disabled adult and knowingly"[213] uses deception or intimidation to obtain that person's property for the temporary or permanent use of the offending person or a third person. The offense can be either a first, second or third-degree felony depending upon the value of the property involved.[214] The language of section 825.103(1)(a) is very similar to that of the Illinois statute noted with approval in *Cuda*. While the Illinois statute only dealt with permanent deprivation, Florida criminal law recognizes that even a knowing temporary deprivation of another's property for the benefit of someone other the owner is theft. Additionally, section 825.101 specifically defines "deception," "intimidation," "position of trust and

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210. *See generally* Morissette v. United States, 342 U.S. 246 (1952).

211. Ch. 95-140, §4, 1995 Fla. Sess. Law Serv. 104, 105 (West).

212. Ch. 95-158, §§ 2-8, 1995 Fla. Sess. Law Serv. 1263, 1264 (West) (to be codified at FLA. STAT. § 825.101-825.106, 39.0001).

213. *Id.* § 4, 1995 Fla. Sess. Law Serv. at 1266 (to codified at FLA. STAT. § 825.103(1)(a)).

214. *Id.* (to be codified at FLA. STAT. § 825.103(2)(a)-(c)). If the property is valued at $100,000 or more, the crime is a first-degree felony. *Id.* (to be codified at FLA. STAT. § 825.103(2)(a)). If the property is less than $100,000 but at least $20,000, the crime is a second-degree felony. *Id.* (to be codified at FLA. STAT. § 825.103(2)(b)). If the property's value is less than $20,000, the offense is a third-degree felony. Ch. 95-158, § 4, 1995 Fla. Sess. Law Serv. at 1266 (to be codified at FLA. STAT. § 825.103(2)(c)).

confidence," and "business relationship," thus following the Illinois example. Finally, *Florida Statutes* section 825.105, addresses the last problem noted in *Cuda*. Good faith efforts which do not result in effective assistance or management of property are not subject to criminal sanctions. In short, chapter 825 clearly seems to have been drafted and passed with the *Cuda* decision in mind. Indeed, given the supreme court's decision in *Cuda*, vagueness challenges to *Florida Statutes* section 825.103(1)(a) should be swiftly and correctly rejected.[215]

B. *Right to Privacy Challenges to Crimes Involving Sexual Relations with Children*

As previously noted, the Supreme Court of Florida decided two cases concerning the constitutionality of statutes involving sexual relations with children. Surprisingly, the court arrived at diametrically opposed results. The first case, *Jones v. State*,[216] involved the constitutionality of *Florida Statutes* section 800.04, concerning a lewd, lascivious or indecent assault or act upon or in the presence of a child.[217] The second case, *B.B. v. State*,[218] involved the constitutionality of section 794.05, concerning carnal intercourse with an unmarried person under eighteen years,[219] when applied to consensual sexual relations between minors. Both constitutional challenges in these cases were predicated upon the right to privacy amendment of the *Florida Constitution*.[220] Both defendants argued that the supreme court's decision in *re T.W.*,[221] which struck down statutory barriers to a minor's right to have an abortion without parental approval, mandated that both section 800.04 and section 794.05 be declared unconsti-

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215. *Florida Statutes* section 825.103(1) actually establishes two offenses against elderly or disabled adults. *Id.* (to be codified at FLA. STAT. § 825.103(1)(a), (b)). Section 825.103(1)(b) makes it a crime to obtain the property of an elderly or disabled person for someone else's benefit, when the person obtaining "[k]nows or should know" that the victim "lacks the capacity to consent." *Id.* (to be codified at FLA. STAT. § 825.103(1)(b)). "Lacks capacity to consent" is specifically defined in section 825.101(9). *Id.* § 2, 1995 Fla. Sess. Law Serv. at 1264 (to be codified at FLA. STAT. § 825.101(9)). This offense is a felony whose degree depends on the value of the property involved. Although this offense was not discussed in *Cuda*, section 825.103(1)(b) also appears to have been drafted with the *Cuda* decision in mind. Vagueness challenges to its constitutionality should also be easily rejected.

216. 640 So. 2d 1084 (Fla. 1994).

217. *Id.* at 1085 (citing FLA. STAT. § 800.04 (1991)).

218. 659 So. 2d 256 (Fla. 1995).

219. *Id.* (citing FLA. STAT. § 794.05 (1991)).

220. FLA. CONST. art. I, § 23.

221. 551 So. 2d 1186, 1196 (Fla. 1989).

tutional. In *T.W.*, the challenged statutory provision allowed the minor to consent, without parental approval, to any medical procedure except an abortion.[222] In declaring this statutory prohibition unconstitutional, the Supreme Court of Florida recognized that the Florida constitutional right to privacy is extremely broad and applies to both adults and minors.[223] Since minors enjoyed the constitutional right to privacy as well as adults, the court in *T.W.* considered whether the State had an overriding state interest that could restrict the minor's right to an abortion.[224] Finding no such compelling interest, the court found that the statute in question there unconstitutional.[225]

1. Lewd, Lascivious, or Indecent Assault Upon a Child

Florida Statutes section 800.04 criminalizes various sexual acts with children under sixteen. In *Jones v. State*, the defendant was charged under section 800.04(2) for having sexual relations with a minor under sixteen.[226] Jones argued that based upon the expansive right to privacy for minors announced in *T.W.*, that portion of section 800.04 providing that consent is not a defense to sexual relations with minors must also be considered unconstitutional.[227] Jones admitted to having sexual relations with a person under sixteen but was denied at trial the right to raise this person's consent as a defense. The district court of appeal framed the issue as "whether a minor under sixteen years of age has a right, protected by Florida's constitutional right of privacy, to engage in consensual sex."[228] If so, this right could not be denied by prosecuting a person with whom the minor had sexual relations, thus mandating that the particular language of section 800.04 be considered unconstitutional. Jones argued that in this case, the minors had not been harmed and that they had wanted to engage in personal sexual relations. Therefore, the minors did not want any of the

222. *Id.* at 1189-90.

223. *Id.* at 1193.

224. *Id.*

225. *Id.* at 1194.

226. *See* Jones v. State, 619 So. 2d 418, 420 (Fla. 5th Dist. Ct. App.), *review granted*, 629 So. 2d 133 (Fla.), *rev'd sub nom.* Rodriguez v. State, 629 So. 2d 134 (Fla. 1993), *and aff'd*, Jones v. State, 640 So. 2d 1084 (Fla. 1994).

227. *Id.* at 419. The specific language Jones challenged was that "[n]either the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section." FLA. STAT. § 800.04 (1991).

228. *Jones*, 619 So. 2d at 420.

protection offered by the statute. The district court found this irrelevant and upheld the section's constitutionality.[229]

The Supreme Court of Florida found that the purpose of the law was to protect minors from "sexual exploitation, physical harm, and sometimes psychological damage, [stemming from sexual relations], regardless of the child's maturity or lack of chastity."[230] The court noted an important distinction between the statute involved in *T.W.* and the section involved here. In *T.W.*, the pregnant minor could consent to any number of surgical medical procedures except an abortion. Thus, she had been statutorily granted the right to consent with respect to certain procedures and was only denied the right to have an abortion. As the supreme court noted, "[*In re*] *T.W.* did not transform a minor into an adult for all purposes."[231] The court noted that the right of privacy granted to minors did not vitiate all legislative authority to protect minors from the conduct of others, especially when the conduct involves an adult, as opposed to a minor.[232] As a result, the court found a compelling state interest in protecting children from sexual activity and exploitation before they physically and mentally reach maturity.[233] Therefore, section 800.04 was declared constitutional.[234]

2. Carnal Intercourse with Unmarried Person Under Eighteen Years

Following the decision in *Jones*, the Supreme Court of Florida in *B.B. v. State*[235] considered a similar constitutional attack on section 794.05. This attack was once again predicated on the *In re T.W.* decision and the *Florida Constitution*'s privacy amendment. Factually, there appears to be one significant difference between the two cases. In *Jones*, the consensual sexual relations occurred between an adult and a minor under sixteen years of age. In *B.B.*, the consensual sexual relations occurred between two sixteen-year-olds. Also, unlike section 800.04 in *Jones*, section 794.05 protects only previously chaste minors under eighteen, and not all minors in general. Thus, the supreme court found that the issues in the two cases were very different. The court phrased the issue as "whether a minor who

229. *Id.* at 422.
230. Jones v. State, 640 So. 2d 1084, 1086 (Fla. 1994).
231. *Id.* at 1087.
232. *Id.*
233. *Id.*
234. *Id.*
235. *B.B.*, 659 So. 2d at 258-59.

engages in 'unlawful' carnal intercourse with an unmarried minor of previous chaste character can be adjudicated delinquent of a felony of the second degree in light of the minor's right to privacy guaranteed by the *Florida Constitution.*"[236]

As in *Jones*, the court found that the defendant here had a legitimate expectation of privacy in carnal intercourse.[237] Thus, the question again was whether there could be a compelling state interest restricting this expectation. The court, as in *Jones*, recognized that a minor's right to engage in sexual intercourse is not absolute and can be restricted.[238] However, unlike the decision in *Jones*, the court found that, as applied to the facts of this case, the state had failed to carry its burden to adjudicate the minor delinquent as a second-degree felon.[239] The court found that a much different situation exists when there are minor/minor sexual relations as opposed to adult/minor sexual relations.[240] In the adult/minor situation, as in *Jones*, prevention of the adult's sexual exploitation of the minor is the compelling reason for the statute's constitutionality.[241] However, in the minor/minor situation, the State has an interest in protecting both minors from sexual activity for reasons of health and quality of life.[242] Thus, since the interest of both minors were involved in *B.B.*, prosecuting one of them was not considered the least intrusive means of furthering the State's compelling interest.[243]

The *B.B.* court also criticized the statutory language of *Florida Statutes* section 794.05. The court found that this section only applied to previously chaste minors, and not all minors.[244] Thus, the purpose of the statute could not be to protect all minors from sexual activities, since it only applied to those who had not previously engaged in sexual activities. Instead, the court found that the statute, as applied here, was being used "as a weapon to adjudicate a minor delinquent."[245] Thus, the statute was declared unconstitutional.[246]

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236. *Id.* at 258.
237. *Id.*
238. *Id.* at 259.
239. *Id.*
240. *B.B.*, 659 So. 2d at 259.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at 259-60.
245. *B.B.*, 659 So. 2d at 260.
246. *Id.*

Despite some misleading newspaper headlines,[247] the decision in *B.B.* does not legitimize all consensual sexual relations between minors. As Justice Kogan pointed out in his concurring opinion, section 800.04 might serve, in certain situations, to provide a vehicle for prosecution.[248] Under that statute neither the victim's lack of chastity nor the victim's consent is a defense. Admittedly, *Jones* did not consider a minor/minor sexual relation situation. However, the court could possibly find that sexual relations between a sixteen-year-old or a seventeen-year-old minor and one under the age of sixteen are much different than the situation confronting it in *B.B.* In the former situations, the older minor clearly could be statutorily presumed as being the more mature party, thus meriting prosecution despite the consent of his/her sexual partner. At any rate, the supreme court did not rule on this particular question in *B.B.*, so it remains to be settled in future cases.

C. *Improper Delegation of Powers*

During this survey period, the Supreme Court of Florida had a rare opportunity to discuss the delegation of powers doctrine in the context of a criminal case. The delegation doctrine is based upon the principle of separation of powers. Under this principle, one branch of government cannot exercise the powers of another branch. In *B.H. v. State*,[249] the Supreme Court of Florida, in an interesting discussion of apparent first impression, addressed the issue of how extensive a role an administrative agency may take in defining the elements of a crime.

Former *Florida Statutes* section 39.061, which is part of the Florida Juvenile Justice Reform Act of 1990,[250] made it a third-degree felony to "escape from any secure detention or any residential commitment facility of restrictiveness level VI or above. . . ."[251] Former *Florida Statutes* section 39.01(61)[252] defined "restrictiveness level"[253] and required the state

247. *See* Mark Silva, *Sex Between Youths Ruled Legal*, MIAMI HERALD, June 30, 1995, at 5B.

248. *B.B.*, 659 So. 2d at 260 n.2 (Kogan, J., concurring).

249. 645 So. 2d 987 (Fla. 1994), *cert. denied*, 115 S. Ct. 2559 (1995).

250. *Id.* at 987 (citing FLA. STAT. § 39.0205 (Supp. 1990)).

251. FLA. STAT. § 39.061 (1991).

252. *Id.* at 989 (quoting FLA. STAT. § 39.01(61) (1991)). The definitions contained in *Florida Statutes* section 39.01 apply to chapter 39 as a whole.

253. "Restrictiveness level" was defined as: "[T]he identification of broad custody categories for committed children, including nonresidential, residential, and secure residential." *B.H.*, 645 So. 2d at 989 (quoting FLA. STAT. § 39.01(61) (Supp. 1990)).

Department of Health and Rehabilitative Services ("HRS") to establish various restrictiveness levels, as long as no more than eight such levels were established. Pursuant to this authority, the department had established four restrictiveness levels, numbered two, four, six, and eight. B.H. had pled nolo contendere, with leave to challenge the constitutionality of former section 39.061 on appeal, involving a charge of escaping in March, 1992 from a level six juvenile facility. The Fifth District Court of Appeal rejected the claim that this law represented an unconstitutional delegation of power.[254] The Supreme Court of Florida granted review due to the conflict between this and another district court of appeal decision.[255]

Before deciding this precise question, the supreme court reviewed what the delegation doctrine is based upon. Under the *Florida Constitution*, all political power belongs to the people,[256] and it is for them to say how these powers may be exercised. The court noted that Florida has established a three-part government based upon the separation of powers doctrine. Article II, section 3 of the *Florida Constitution* expressly divides the state government into three branches; legislative, executive, and the judicial.[257] This article and section expressly provide that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."[258] Thus, the *Florida Constitution* has textually adopted a strict separation of powers doctrine. If any state statute attempts to give to one branch power assigned to another branch by the *Florida Constitution*, then that statute represents an unconstitutional delegation of powers. Under the *Florida Constitution*,[259] the legislature has the power to pass laws and to declare what these laws are. Any delegation of this power violates the constitution. The supreme court found that this legislative power encompasses the ability to define criminal defenses. In the area of criminal law, the court noted that the concept of separation of powers in the non-delegation doctrine is also linked to the constitutional guarantee of due process. This due process guarantee is found in article I, section 9 of the constitution and requires that a criminal statute reasonably

254. B.H. v. State, 622 So. 2d 615, 617 (Fla. 5th Dist. Ct. App. 1993), *rev'd*, 632 So. 2d 1025 (Fla.), *approved in part*, 645 So. 2d 987 (Fla. 1994), *and cert. denied*, 115 S. Ct. 2559 (1995).

255. D.P. v. State, 597 So. 2d 952 (Fla. 1st Dist. Ct. App. 1992).

256. FLA. CONST. art. I, § 1.

257. *Id.* art. II, § 3.

258. *Id.*

259. *Id.* art. III, § 1.

apprise citizens of the acts that it prohibits.[260] When the legislature by statute delegates to another branch of government the power to define what a criminal offense is, both the non-delegation and the due process doctrine are violated. Under these doctrines, the attempt to give an administrative agency the authority to define what is criminal would be clearly unconstitutional.

The Supreme Court of Florida in *B.H.* found that both the due process and the non-delegation doctrines were violated by former *Florida Statutes* section 39.061.[261] The statute declared that escape from a residential commitment facility of restrictiveness level six or above was a felony. However, the statute did not attempt to define what such residential commitment facilities were. Instead, the legislature gave to HRS the ability to define restrictiveness levels in terms of broad custody categories based on the needs of the children. The only limitation on this authority was that there could be no more than eight such restrictiveness levels. The court found that while this delegation may have created a minimum standard, it did not create a maximum standard beyond which HRS could not go.[262] While *B.H.* did not address the general issue of "how much of a role may administrative agencies take in defining the elements of crime,"[263] the supreme court did state that any delegations "must *expressly* articulate reasonably definite standards of implementation that do not merely grant open-ended authority, but that impose an actual limit—both minimum and maximum—on what the agency may do."[264] Here, former section 39.061 imposed a minimum limit but did not impose any maximum restriction on the ability of HRS to define restrictiveness levels. In essence, HRS was improperly delegated the ability to define an essential element of what constituted juvenile escape in Florida, thus causing that part of the statute to be unconstitutional.

Former *Florida Statutes* section 39.061 not only criminalized escape from a juvenile commitment facility, but it also made it a crime to escape from a secure detention facility. While there was no improper delegation of legislative authority as far as the definition of what constituted a secure detention facility the supreme court felt that it could not sever the unconsti-

260. *Id.* art. I, § 9.

261. *B.H.*, 645 So. 2d at 993-94.

262. *Id.* at 994.

263. *Id.* at 990. The court did note that it believed that "[i]t clearly is impossible to adopt a single bright-line test to apply to all alleged violations of the nondelegation doctrine." *Id.* at 993.

264. *Id.* at 994.

tutional part of section 39.061 from the rest of the statute. If such a severance was performed, it would be a crime to escape from a pretrial secure detention facility, but not from a post-trial commitment facility. This situation created an absurd situation which the legislature could not have intended. Thus, the entire statute was found unconstitutional.[265]

Although the *B.H.* decision provides an instructive and interesting discussion of the delegation doctrine, as applied to the criminal law, its result is of little practical effect for two reasons.[266] First, the court's conclusion that former section 39.061 was unconstitutional did not help B.H. in any way. In addition, the supreme court in *B.H.* decided that declaring former section 39.061 unconstitutional did not automatically leave Florida without a statute governing an escape from a juvenile commitment facility. Instead, the court found that under the doctrine of statutory revival, former *Florida Statutes* section 39.112[267] was automatically revived. This section was the immediate past predecessor of the unconstitutional section 39.061 and was itself constitutional. Thus, Florida still had a juvenile escape law under which B.H. was found delinquent.[268] Second, and even more importantly, the Florida Legislature amended section 39.061 well before the supreme court decided this case.[269] Present section 39.061 makes it a crime to escape from either a secure detention facility or from any residential commitment facility defined in section 39.01(58).[270] These two definitions do not delegate to HRS or any other administrative agency the task of defining what constitutes such facilities. Instead, the two sections

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265. *B.H.*, 645 So. 2d at 994.

266. During this survey period, one district court of appeal did cite *B.H.* in its decision finding that the language in former *Florida Statutes* section 790.001(4) partially defining a "destructive device" for purposes of chapter 790 as including "any device declared a destructive device by the Bureau of Alcohol, Tobacco, and Firearms" was an improper delegation of authority to an administrative agency. State v. Mitchell, 652 So. 2d 473, 478 (Fla. 2d Dist. Ct. App. 1995) (quoting FLA. STAT. § 790.001(4) (1991)). However, the court found that this language could be severed from the rest of section 790.001(4). *Id.* When this was done, the remaining definitions in this part met constitutional standards and survived. *Id.* at 478-79.

267. FLA. STAT. § 39.112 (1989).

268. *See also* S.W.M. v. State, 647 So. 2d 313, 314 (Fla. 2d Dist. Ct. App. 1994) (upholding a conviction for escape from a halfway house in 1992). This case noted that *B.H.* had declared former *Florida Statutes* section 39.061 unconstitutional but also noted that *B.H.* had found the previous escape statute automatically by its decision. *Id.* Thus, the delinquency adjudication in *S.W.M.* was affirmed. *Id.*

269. *See* 1992 Fla. Laws ch. 92-287.

270. Ch. 95-152, § 12, 1995 Fla. Sess. Law Serv. 1229, 1243 (West) (amending FLA. STAT. § 39.061).

provide criteria for establishing which children should be placed in these facilities and examples of what kinds of programs fall within the parameters of HRS authority. Thus, the unconstitutional delegation problems found in *B.H.* do not exist under the present version of section 39.061.

IV. CONCLUSION

The Supreme Court of Florida yearly decides a number of important cases in the field of substantive criminal law. Certainly this statement was true for the period covered by this survey. The majority of the court's opinions settled more issues than they raised. Unfortunately, even after *Young*[271] and *Bias*,[272] there still remain serious issues to explore regarding both felony petit theft charges, and the voluntary intoxication and insanity defenses.

In the decisions addressing constitutional challenges to some of Florida's substantive criminal laws, the supreme court's detailed opinions in both *Cuda*,[273] regarding exploitation of the elderly and disabled, and in *B.H.*,[274] regarding escape from juvenile commitment facilities, provided extensive guidance on how to correct the constitutional deficiencies found there. Thus, the Florida Legislature was able to respond quickly and effectively to pass new laws in these areas which should withstand future constitutional challenges.

271. 641 So. 2d at 401.
272. 653 So. 2d at 380.
273. 639 So. 2d at 22.
274. 645 So. 2d at 987.

Domestic Violence: Recent Amendments to the Florida Statutes

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TABLE OF CONTENTS

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I. INTRODUCTION

In the past, "domestic violence" meant violence within the home which causes death or injury to another. Past policy assumed the victim to be a wife and the perpetrator to be a husband,[1] and depended upon preconceived notions of gender roles and unexamined assumptions about the structure and nature of the family. In many domestic violence cases, the traditional family has changed or disappeared. Often, violence occurs between people who live together but who are not married. The genders of the victim and perpetrator also are not necessarily fixed. In fact, the gender of the parties may be the same. Accordingly, the notions of "victim" and "perpetrator" have thus evolved.

If alignments of gender, victim, and perpetrator have changed, so has our understanding of domestic violence. Traditionally, violence has been understood to mean physical death or injury. However, violence, as now addressed in the *Florida Statutes*, takes several forms and is to be viewed in light of its potential social consequences. Domestic violence affects the stability and success of marriages, and a variety of familial and economic relationships. Domestic violence also alters psychological growth patterns in children. Family ties become dysfunctional and torn, which jeopardizes long-term relationships. While physical injuries may seem short-lived, the mental and emotional effects of domestic violence often cause long-term psychological harm, which impacts on existing and future generations.

Children have always been participants in domestic violence as both victims and witnesses of what occurs. Not only do children become victims of direct physical violence, they become victims of indirect physical violence by experiencing the effects of physical violence upon a parent or caretaker. Children also become victims of direct and indirect emotional violence, as well. Violence resulting in the collapse of families affects children in multiple ways, including their development into psychologically healthy adults.[2] Moreover, we now know that young victims of domestic violence often become abusers themselves.

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1. LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS 3 (1986).

2. RICHARD J. GELLES & MURRAY A. STRAUS, INTIMATE VIOLENCE 91 (1988) [hereinafter GELLES & STRAUS].

Physical forms of domestic violence rely upon and exalt brute strength. Accordingly, physical forms of domestic violence send dangerous messages that: 1) physical strength and brute force are appropriate communicators in resolving conflicts; 2) whoever is physically strongest prevails; and 3) whatever the dispute or circumstances, violence is an acceptable means of resolving disputes. In such cases, physical strength defines roles and capabilities. Children, the elderly, and women often lack physical strength commensurate with the abuser. Lack of physical prowess marks and measures the vulnerability of victims. In domestic violence situations, the stronger individual is superior.

These messages and public tolerance of domestic violence degrade the social fabric and undermine public understanding that reason should be the basis for decision making and dispute resolution. Reason is one of the principal bases of the law. In addition, public tolerance or silence about domestic violence leads to profound economic and social costs, including disregard for the law. Many victims and perpetrators who are arrested lose days of work. As a result, families lose income. Furthermore, physical and mental injuries increase medical costs to victims and the nation. The loss of even one productive person, whether adult, elderly, or child, is high.

In response to the social and economic costs of domestic violence, Florida enacted legislation in 1992 which addressed a range of domestic violence issues and problems. These laws were later amended in 1994 and 1995. In making these changes, the Florida legislators attempted to ameliorate prior laws that did not adequately protect victims. Thus, to achieve this end, Florida's new legislation placed additional responsibilities on judges, police officers, prosecutors, and clerks of the court.

It is the legislature's intent that domestic violence be treated as an "illegal act" rather than a "private matter."[3] As a result of this policy, the legislature also expanded and altered the traditional view of what constitutes domestic violence as well as who may be regarded as a victim or perpetrator.

The time has come to test the efficacy of the new language in Florida's domestic violence statutes. Do the new statutes effectively communicate the legislature's goals to those charged with administering and interpreting them? Do those affected by the new statutes understand them and feel capable of enacting and obeying them? This article examines these questions both analytically and empirically. Specifically, this article proposes that although the legislature may have attained its goal in passing

3. FLA. STAT. § 741.2901(2) (Supp. 1994).

laws protecting victims in domestic violence situations, the legislature failed to effectively communicate those aims to its many audiences.

This article further asserts that the term "domestic violence" is both inadequate and deceptive, and as such, lessens the significance of the crimes it purports to designate. Such crimes should be taken seriously and should be classified under standard language used to describe violent acts. The term "domestic violence" is unnecessarily soft and distinguishes assault and battery in the home from traditional assault and battery. Finally, this article suggests that Florida's statutes should be further refined to assist those who must comply with its provisions.

Part II of this article presents an historical survey of how women and other victims of domestic violence have been treated from ancient times to the present. Part III offers a close study of Florida's domestic violence statutes by comparing the 1991 statutory language with changes enacted between 1992 and the present, a period during which sweeping reforms occurred in Florida. In addition, Part III analyzes the language of individual statutes, paying close attention to structure, form, and style.

To determine the clarity of Florida's statutory language, this article considers elements of structure and style, including the use of nouns, verbs, qualifiers, nominalizations, powerful speech, powerless speech, hypercorrectness, complex syntax, direct syntax, motifs, values, and morals. This section also defines how the new statutory provisions impact those affected most: namely, victims, judges, police, prosecutors, defense attorneys, clerks of the court, and society in general. Specifically, Part III tests the effectiveness of the new statutes on its intended audiences.

Part IV of this article advocates the elimination of the term "domestic violence" because it seems to separate crimes of domestic violence from other crimes such as assault and battery. Including battery upon one's spouse within the realm of domestic violence, rather than under the general battery provisions of the *Florida Statutes*, suggests that the crime is different and less serious. In truth, however, the crimes are one and the same. Thus, this section proposes either a change in, or an elimination, of the statutory title of "domestic violence."

II. HISTORICAL BACKGROUND OF DOMESTIC VIOLENCE

The word family, for many, represents warm memories, a safe haven, and the American dream. For others, however, this dream has become a nightmare. Family violence is a serious and seemingly intractable problem in the United States which transcends race, religion, age, gender, and socioeconomic strata. Its occurrence is nondiscriminatory, frequent, and

widespread. What once was shrouded in secrecy is now reported daily by the media. Violence exists not only among strangers, but among family members.

The term "domestic violence" summarizes, includes, and supersedes expressions like wife beating, battered woman, intimate violence, physical violence, spouse abuse, and family violence. Collectively, these terms describe domestic violence between spouses, family members, and opposite sex partners. Domestic violence is not a private matter protected from society's views of the sanctity of the home. Rather, it involves crimes where the victim either knows, or is related to, the perpetrator.

Because family violence is both personal and subjective, it is frequently unreported. Shame often prevents the victim from seeking assistance. Denial sometimes causes a victim to interpret acts of aggression as typical rather than criminal. For example, Gilda Berger, author of *Violence in the Family*, writes that "national statistics give only incomplete estimates of the incidence and extent of family violence."[4] In 1984, the Attorney General's Task Force on Family Violence Final Report disclosed that "[r]oughly 20 percent of all murder victims in the United States are related to their assailants;"[5] and "[a]bout 1.5 million children are seriously abused each year by their parent, guardian, [or some other person]."[6] Likewise, in her book *The War Against Women*, Marilyn French states that a man beats a woman every twelve seconds.[7] Ann Jones, author of *Next Time, She'll be Dead*, chronicles the alarming escalation of violence against women in Massachusetts.[8] Her statistics indicate that in 1989, a woman was slain by her husband or boyfriend every twenty-two days.[9] In 1990, this number decreased to one slaying in every sixteen days, and one in every nine days in 1992.[10] Regrettably, violence between family members is on the increase.

To address the present needs of families ravaged by domestic violence, one must understand the history of domestic violence. Violence in the home is not a new or recent phenomenon, particularly violence against women. For centuries, men were encouraged to beat their wives and children as a

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4. GILDA BERGER, VIOLENCE AND THE FAMILY 10 (1990).
5. *Id.*
6. *Id.* at 11.
7. MARILYN FRENCH, THE WAR AGAINST WOMEN 187 (1992).
8. ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT 7 (1994).
9. *Id.*
10. *Id.*

right of entitlement by gender, for social, economic, political, and psychological power.[11] Physical beating was an accepted corollary of male dominance.

A. *Spouse Abuse*

1. Violence Against Women

According to Lewis Okun, author of *Woman Abuse: Facts Replacing Myths*,[12] abuse of women can be traced back to 753 B.C. to the reign of Romulus.[13] Romulus established rules making the husband the sole head of the household and his wife his possession. A wife had no legal rights and was not viewed as a separate entity. A wife's misbehavior could, therefore, result in punishment by her spouse because husbands were held accountable for their wives' actions. In an effort to insure conformity, Roman law gave the husband the legal right to punish his wife physically for various infractions. These laws were known as the "Laws of Chastisement." Roman law further mandated inequalities in sentencing. If a wife committed adultery or drank wine, for example, she faced the death penalty. However, if her husband did the same thing, he would go unpunished.[14]

Okun states further that after the Punic Wars in 202 B.C., conditions in the family changed and afforded some freedom to women.[15] Widows who previously had no rights became property owners. In addition, wives were allowed to sue their husbands if they had been unjustly beaten. While the laws of Rome regarding the treatment of women relaxed slightly over time, the rise of Christianity reaffirmed male dominance and soundly supported patriarchal authority.[16] Okun points out that while the teachings of Jesus Christ support equality in marriage, the early church fathers did not.[17] The New Testament is replete with statements that encourage female

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11. LINDA GORDON, HEROES OF THEIR OWN LIVES 251 (1988).
12. OKUN, *supra* note 1.
13. *Id.* at 2.
14. *Id.*
15. *Id.*
16. *Id.* at 3.
17. OKUN, *supra* note 1, at 3. The church's support of wife abuse is clearly outlined in the *Rules of Marriage*, written by Friar Cherubino Siena in the second half of the fifteenth century. Okun quotes Siena:

> When you see your wife commit an offense, don't rush at her with insults and violent blows. . . . Scold her sharply, bully and terrify her. And if this still doesn't work . . . take up a stick and beat her soundly, for it is better to punish

servitude. For example, in I *Peter* 3:1, the apostle said "ye wives, *be* in subjection to your own husbands[.]"[18] Religion continued to influence the treatment of women throughout the sixteenth century.[19]

The Laws of Chastisement remained firmly intact for centuries, spanning through several cultures. Wives were considered chattel and remained legally deprived of the rights possessed by men. For example, the "Rule of Thumb" tenet, a part of British common law, allowed beatings of one's wife with a stick no greater in circumference than her husband's right thumb.[20] Maria Roy, author of *Children In the Crossfire*, states that "[t]his regulation was considered to be a lenient piece of legal reform."[21] Linda Gordon states that the Rule of Thumb is evidence of the extremes in women's suffering, humiliation, and powerlessness in prior years.[22] At that time, there were no restrictions limiting brutality against women. Women were at the mercy of men. Opposition to the Rule of Thumb came from women themselves and through the support of the patriarchal community.[23] The patriarchal community did not defend the legitimate issue of women's rights, rather it supported its long-established practice, considered to be unwritten law, through its customs and bargaining aimed at regulating social issues within their community.[24] Even the modifications which resulted, however, encouraged the brutality to continue.

It was not until the end of the nineteenth century that reform began to produce changes in the treatment of women in both England and America. In 1861, English philosopher John Stuart Mill wrote *The Subjection of Women* which resulted in tremendous controversy.[25] Mill's words, even

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> the body and correct the soul. . . . Readily beat her, not in rage but out of charity . . . for [her] soul, so that the beating will redound to your merit and her good.

Id. at 3 (quoting Friar Cherubino Siena, *Rules of Marriage*).

18. *Id.* (quoting 1 *Peter* 3:1).

19. *Id.* at 3-4. This influence stemmed from the rise of Protestantism in 1517 in Wittenberg, Germany, and England, and in 1536 during the rise of Calvinism in Switzerland.

20. MARIA ROY, CHILDREN OF THE CROSSFIRE 38 (1988).

21. *Id.*

22. GORDON, *supra* note 11, at 256.

23. *Id.* The enforceability of the "Rule of Thumb" was challenged by women willing to defend themselves and who were supported by their allies within the patriarchal community. The patriarchal community is defined as a system larger than any individual family having established regulations followed by all members. Patriarchal fathers controlled their households but were subject to sanctions—social control—by the community. *Id.*

24. *Id.*

25. OKUN, *supra* note 1, at 5.

though written over a century ago, have "lost little of their relevance" in today's society.[26] Mill wrote:

> When we consider how vast is the number of men, in any great country, who are little higher than brutes, and that this never prevents them from being able, through the law of marriage, to obtain a victim, the breadth and depth of human misery caused in this shape alone by the abuse of the institution swells to something appalling.
>
> The vilest malefactor has some wretched woman tied to him, against whom he can commit any atrocity except killing her, and if tolerably cautious, can do that without much danger of the legal penalty.[27]

Seventeen years following Mill's scathing commentary on the plight of battered women, Frances Cobbe wrote *Wife Torture in England*.[28] Cobbe condemned the brutality of blue collar husbands in Liverpool and labeled their community a "kicking district."[29] The writings of these advocates, plus Queen Victoria's rise to power, resulted in the enactment of new laws that raised the status of women in England.[30]

In the United States, wife beating was effectively illegal in most states by the year 1870, with the exception of Mississippi.[31] Wife beating had become a disreputable, seamy practice. Women began seeking protection from child abuse agencies and by the late nineteenth century, women sought protection in small campaigns that fought for increased criminal prosecutions and severe sentences for wife beaters, including corporal punishment. The awareness of wife beating was masked by the growing concern over child abuse. Both forms of abuse, however, simultaneously made substantial progress toward becoming less tolerable and illegal although spanking a child was still acceptable. Domestic violence was a source of concern throughout the nineteenth century women's rights movement. It was indirectly addressed through temperance, child welfare, and social purity campaigns, and only marginally addressed through direct lobbying for legislation or judicial reform.[32]

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26. *Id.*
27. *Id.* (quoting JOHN STUART MILL, THE SUBJECTION OF WOMEN 63-65 (1861)).
28. *Id.* (citing FRANCES COBBE, WIFE TORTURE IN ENGLAND (1878)).
29. *Id.* (citing EMERSON R. DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES (1979)).
30. OKUN, *supra* note 1, at 5.
31. GORDON, *supra* note 11, at 254.
32. *Id.*

Unfortunately, socialization in the late nineteenth century and early twentieth century witnessed a lack of progress and concern for the victimized woman. By 1910, most states granted divorce for physical abuse.[33] In the 1930s, women had to allege child abuse in order to get agency help.[34] However, subsequent investigations revealed that the actual abuse was against the wife.[35] This treatment continued throughout the 1930s. During that time, women were more likely to be protected by the court system on issues such as nonsupport than for physical violence.[36] Women believed in the support offered through social services.[37] These agencies sent messages that the court system offered more protection on issues of support than protection from physical abuse.[38] Ironically, after women's suffrage, the issue lay dormant for five decades.[39] Spouse abuse flourished behind closed doors and remained a private matter between a husband and a wife.[40] For some, the marriage license was a license to beat or even to kill.

History confirms that the single most important factor influencing renewed interest in the plight of battered women was the emergence of the women's liberation movement during the 1970s and the associated changes in media coverage.[41] Only when countless women found courage to defend themselves did the nation become aware of the devastating scope of domestic violence. Media attention focused first on rape victims and then on battered women.[42] By 1976, high circulation newspapers and magazines began printing articles detailing wife abuse.[43] In addition, broadcast journalists reported nightly on incidents of wife abuse. These broadcasts were particularly compelling because the words were enhanced by graphic visual images of brutality. Thereafter, television talk shows and television movies began exploring the issue of domestic violence.

Arguably, the most effective media messages concerning domestic violence were two movies which told the stories of Francine Hughes and Tracey Thurman. Together, these films left an indelible mark upon society's

33. OKUN, *supra* note 1, at 6.
34. GORDON, *supra* note 11, at 259.
35. *Id.* at 259-60.
36. *Id.* at 258.
37. *Id.* at 258-59.
38. *Id.*
39. OKUN, *supra* note 1, at 6.
40. *Id.* at 6-7.
41. *Id.* at 7.
42. JULIE BLACKMAN, INTIMATE VIOLENCE: A STUDY OF INJUSTICE 10 (1989).
43. *Id.*

collective consciousness. In 1987, viewers watched the torture of a Michigan housewife named Francine Hughes in the television movie titled *The Burning Bed* based on the book by Faith McNulty.[44] The film was widely seen and garnered much praise for its graphic depiction of domestic violence. A second television movie titled *A Cry for Help: The Tracey Thurman Story* aired in October 1989.[45] Thus, media attention immeasur-

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44. FAITH MCNULTY, THE BURNING BED (1980). Hughes' story differed from others that the public had previously seen and heard. After years of agonizing torment, Francine stopped the abuse. On March 9, 1977, she poured kerosene on the floor surrounding the bed where her ex-husband Mickey was sleeping. She then lit a match, dropped it, and fled her home with her children. Later, she drove to the local sheriff's office and confessed to burning her husband. Both her house and her ex-husband were destroyed in the fire.

Gelles and Straus, authors of *Intimate Violence*, note that "the Francine Hughes case unfolded just as feminists across the country were striving to define wife battering as a major social problem." GELLES & STRAUS, *supra* note 2, at 134. Furthermore, the Hughes story set legal precedent. First, Hughes killed her ex-husband as he slept, not during a beating or rape. JONES, *supra* note 8, at 102. Second, her defense was temporary insanity, which Hughes claimed resulted from years of her ex-husband's abuse. *Id.* Third, the jury was permitted to hear evidence that Hughes had been seriously and routinely beaten. Finally, and most importantly, Francine Hughes was acquitted. *Id.* at 103.

45. *A Cry for Help: The Tracey Thurman Story* (NBC television broadcast, Oct. 2, 1989). The movie claimed that Thurman's case was distinctive because the Torrington, Connecticut Police Department apathetically responded to Thurman's telephone calls for help. Separated for eight months from her husband, Charles "Buck" Thurman, who had beaten her violently over a period of a year, Tracy lived at a friend's home with her young son. Repeatedly and publicly, her husband threatened to kill her. Because of these threats, Tracey repeatedly asked the Torrington police to enforce her court order. The police ignored her requests.

On June 10, 1993, Tracey called for help for the last time. She begged police to arrest Buck, who was standing outside her home and screaming to see her. Before responding to the call, however, the officer dispatched to the scene stopped at the police station to use the bathroom. JONES, *supra* note 8, at 50. Twenty-five minutes later, the officer sat in his patrol car and watched as Tracey fled from Buck as he chased, beat, and stabbed her 13 times with a knife. The officer finally left his vehicle and disarmed Buck, but did not arrest him. Instead, the officer watched Buck kick his wife, break her neck, and then seize their child. More officers arrived at the scene and watched. It was not until Buck tried to attack Tracey as she was being lifted into the ambulance that he was arrested, 45 minutes after Tracey had placed the call. *Id.* at 51.

Miraculously, Tracey survived, though she is disfigured and permanently paralyzed on the right side of her body. Courageously, she testified against Buck who received a 15 year sentence. In 1985, Tracey sued the City of Torrington for violating her constitutional right to equal protection under the Fourteenth Amendment. This landmark case settled for 1.9 million dollars in damages against 24 police officers for negligently failing to protect Tracey Thurman and her son from the violent acts of her husband. As a result of Tracey Thurman's ordeal, officers in Connecticut, pursuant to the "Thurman Law," are now mandated to arrest

ably enhanced public awareness of the widespread social problem of domestic violence.

2. Husband Abuse and Partner-to-Partner Assault

An historical discussion of spouse abuse would not be complete without examining husband abuse and partner-to-partner assault. While the number of such incidents is small compared to wife battering, husband abuse and partner-to-partner assault are just as violent and devastating. Instances of husband abuse are "much harder to trace" and "not written into law throughout Western history."[46] The only known historical reference to husband beating is Charivari, a ceremony popular in France during the Middle Ages.[47] Charivari was a means of publicly ridiculing a husband for allowing his wife to abuse him.[48] The husband's punishment for becoming a victim was to be further victimized through the sneers and derision of his community.[49]

Some believe that the negative stigma associated with husband battering is due to a lack of reporting these incidents. The perception is that a husband's masculinity diminishes or is questionable, while his wife's abusive behavior increases her power and control. Others simply choose to ignore the existence of husband abuse. In 1975, however, the National Family Violence Survey confirmed that a "substantial number of women hit and beat their husbands."[50] Studies done since that time support this finding. Another 1975 survey found that "nearly three-fourths of the violence committed by women is done in self-defense."[51] Gelles and Straus state that "more often than not a wife who beats her husband has herself been beaten. Her violence is the violence of self-defense."[52]

Partner-to-partner assault also exemplifies violence between intimates. The term "partner" is gender neutral and generally refers to violent homosexual relationships. In homosexual relationships, blows are no less painful to the victim and the drama is no less devastating to the child who

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offenders in "cases of probable domestic violence." Jeanie Park & Susan Schindehette, et al., *Thousands of Women, Fearing for Their Lives, Hear a Scary Echo in Tracey Thurman's Cry for Help*, PEOPLE WKLY., Oct. 9, 1989, at 112, 113.

46. OKUN, *supra* note 1, at 1.

47. *Id.*

48. *Id.*

49. *Id.* at 1-2.

50. GELLES & STRAUS, *supra* note 2, at 90.

51. *Id.*

52. *Id.*

witnesses it. Ann Jones writes that "the cultural repression of homosexuals trivializes violence within the homosexual community and writes off its victims, presenting immensely complicated problems to those who need help and must seek it from public authorities."[53] As with most abuse, partner-to-partner assault is typically under reported. Fear of nonacceptance, or fear of a homophobic response, prevents many victims from reporting.

However, much is yet to be learned about domestic violence in same sex relationships. To date, the most interesting aspect of lesbian and gay domestic violence is that it questions the widespread belief that violent behavior is a matter of gender and largely attributable to males. Domestic violence in same sex relationships supports the theory that violence is an issue of power and not of gender or sexual orientation.

B. *Child Abuse*

Similar to abuse against women, child abuse is rooted in history. In ancient times, children were considered the property of their fathers.[54] As such, they could be killed, sold, or abandoned. Infanticide, defined as the murdering of infants, was seen as a means of birth control and was encouraged by ancient cultures.[55] In some groups, babies were slaughtered to appease the gods for famines or diseases.[56] Abandonment was another common practice for those seeking to rid themselves of children. Babies were left at designated drop-off sites "where they could be rescued by childless couples or sold off to slavery or beggarhood."[57]

It was not until the 1960s that child abuse was recognized in America as a social problem of national proportions.[58] Experts agree that the publication of C. Henry Kempe's *The Battered Child Syndrome* was responsible for focusing legal, social, and ethical attention upon the plight of American children.[59] Kempe's words shocked his readers when he likened "child abuse to other diseases as a common killer of children."[60] Author Maria Roy attributes the public outcry against child battery to television, whose "[p]ictures had enormous impact on our social and moral

53. JONES, *supra* note 8, at 84.
54. ROY, *supra* note 20, at 32.
55. *Id.* at 33.
56. *Id.*
57. *Id.*
58. *Id.* at 35.
59. BERGER, *supra* note 4, at 26-27.
60. *Id.* at 27 (citing C. HENRY KEMPE, THE BATTERED CHILD SYNDROME (1962)).

conscience."[61] Public outcry on behalf of America's battered children amplified with the rise of the women's movement in the late 1960s.[62] As advocates spoke out, public awareness heightened.[63] Despite this new vision, however, the problem nevertheless persists today. Child abuse and spouse abuse too often are seen as separate social problems.

While spouse abuse and child abuse are the two most common types of intrafamily violence, sibling and elderly abuse are also common forms of violence. Gelles and Straus describe violence between siblings as the "most common and most commonly overlooked form of family violence."[64] While society perceives fighting among children as the norm, surveys show that "[t]hree siblings in one hundred used weapons."[65] Experts interpret this to mean that nationally, "more than a hundred thousand children annually face brothers or sisters with guns or knives in their hands."[66]

Regardless of whether the victim is an adult or a child, violence in the home continues to claim countless families each year. Lifetimes of abuse are endured in the false hope of a brighter tomorrow. For some, tomorrow never comes. The effects of family violence are so far-reaching that no member of society remains untouched. Absenteeism from jobs and loss of productivity are common among victims in the work force. Low school attendance or inappropriately aggressive behavior in the classroom often are characteristics of child abuse victims.

Only when society has zero tolerance for domestic violence will it cease being the pervasive destroyer it is. It is incumbent that the stronger members of society empower the weaker, thereby strengthening society as a whole. When one child is beaten in body or spirit, when one grandparent is derided or duped, or when one wife is battered or broken, we all share the pain.

III. FLORIDA'S DOMESTIC VIOLENCE STATUTES

The Florida Legislature enacted domestic violence statutes in 1984 and 1991. Since 1991, multiple changes to the statutes have occurred providing victims of domestic violence with new protections and rights. The following discussion focuses on eight domestic violence statutes. Each

61. ROY, *supra* note 20, at 35.
62. *Id.* at 35-37.
63. *Id.* at 36-38.
64. GELLES & STRAUS, *supra* note 2, at 59.
65. *Id.* at 60.
66. *Id.*

discussion recommends ways to strengthen the language of the new statutory provisions.

A. *Standards for Judges in Domestic Violence Cases*

The purpose of section 25.385 of the *Florida Statutes* is to enable the Florida Court Educational Council ("FCEC") to "establish standards for instruction of circuit and county court judges" in handling domestic violence cases.[67] The statute requires judges to receive education in the area of domestic violence.[68] The section also redefines the terms "domestic violence" and "family or household member."[69]

Subsection 23.385(1) of this statute clearly contains mandatory language. It requires that the council "shall establish standards . . . and . . . shall provide such instruction on a periodic and timely basis."[70] This language compels judges to receive additional education, thereby strengthening Florida's law. However, a further revision should be to make time tables specific and establish mandatory dates by which standards will be created. Furthermore, the word "periodic" and the phrase "timely basis" should be changed because these terms are too vague for a statute that attempts to provide mandatory requirements.

In Florida, county judges also handle domestic violence cases. Therefore the words "and county judges" were a necessary addition. The concise wording of subsection 23.385(1) shows the legislature's intent that all members of the judiciary who will hear domestic violence cases receive special, uniform training provided by the FCEC.

Subsection 23.385(2) provides definitions of "domestic violence" and "family or household member." To reduce excess verbiage, however, this section could simply refer to section 741.28,[71] which also defines these terms. In a new and changing area of law such as domestic violence, however, including definitions of these terms in each statute may aid the reader who is new to this field of law, or a lay person. Therefore, including these definitions would be beneficial.

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67. FLA. STAT. § 25.385(1) (1993). Under subsection 23.385(1), "[t]he Florida Court Educational Council shall establish standards for instruction of circuit and county court judges who have responsibility for domestic violence cases, and the council shall provide such instruction on a periodic and timely basis." *Id.*

68. *Id.*

69. *Id.* § 25.385(2)(a)-(b).

70. *Id.* § 25.385(1).

71. FLA. STAT. § 741.28(1)-(2) (Supp. 1994).

B. *Availability of Judges for Hearings*

Section 26.20 requires that in circuits with more than one circuit judge, at least one judge in each circuit be available twenty-four hours each day of the year to address domestic violence emergencies.[72] Such availability is necessary to issue temporary injunctions in situations requiring them. Twenty-four-hour availability is the judiciary's first line of defense between the assailant and the victim. A judge can issue a temporary order prohibiting any contact between the parties. This act may save a victim from further injury or even death. From the assailant's point of view, judicial action may prevent him or her from committing an act that could lead to criminal sanctions.

It is certainly advantageous to the victim to always have available at least one judge, whether it be a circuit or county judge, to hear motions for ex parte temporary injunctions. Before the legislature enacted this change, no judges were available to hear temporary injunctions on weekends, after hours, or on holidays. Unfortunately, domestic violence does not keep a schedule. Prior to any statutory revisions, a victim who could have turned to the court after hours, would do so to no avail because judges could not provide proper protection. It was absurd that victims could only receive emergency aid from a judge if they were attacked during business hours. Thus, the addition to the statute requiring judges to be available "around-the-clock" was certainly necessary because the law now provides an immediate remedy for battered victims. Nevertheless, the language of the statute could be modified further to more precisely articulate that the number of judges available is based on the size of the circuit.

The legislature thought time constraints were important enough to include mandatory language in the statute. The statute states that "judges *shall* be available . . . to hold and conduct hearings in chambers."[73] Furthermore, "there *must* be at least one judge available . . . to hear motions . . . in domestic violence cases."[74] The statute has numerous gaps that

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72. FLA. STAT. § 26.20 (1993). The statute states that:

> In circuits having more than one circuit judge, at least one of said judges shall be available as nearly as possible at all times to hold and conduct hearings in chambers. In each circuit, there must be at least one judge available on Saturdays, Sundays, holidays, and after hours on weekdays to hear motions for a temporary injunction ex parte in domestic violence cases. The chief judge may assign a judge for this purpose.

Id.

73. *Id.* (emphasis added).

74. *Id.* (emphasis added).

could affect a potential victim. For example, the last sentence of the statute fails to define who the available judge must be. The last sentence of the statute further states that "[t]he chief judge *may* assign a judge for this purpose."[75] Unlike the first two sentences of the statute which use mandatory language, this provision bestows upon the chief judge in each circuit the discretion to decide which judge will be on call for domestic violence cases that occur after hours. The word "may" is less definite than the word "shall." Thus, by using weaker terminology in lieu of the stronger, mandatory language, a gap occurs which could be unfavorable to a potential victim of domestic violence.

Potential problems could arise where the chief judge in a circuit does not assign a judge. The statute would have been more effective if it had required that the chief judge assign a judge instead of making the decision discretionary. Discretion should be left to deciding who the most qualified judges are, or which judges have special training in domestic violence cases. However, regardless of which factors affect the decision, the chief judge should be required to make that decision. This requirement would effectively strengthen the statute and would be more indicative of a statute which the legislature clearly thought of as indispensable.

C. *Definition of Domestic Violence*

The 1994 version of section 741.28 of the *Florida Statutes* defines domestic violence as "any assault, battery, sexual assault, sexual battery, or any criminal offense resulting in physical injury or death of one family or household member by another who is or was residing in the same single dwelling unit."[76] The definition, however, fails to define the word

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75. *Id.* (emphasis added).

76. FLA. STAT. § 741.28 (Supp. 1994). The entire section reads:

> (1) "Domestic violence" means any assault, battery, sexual assault, sexual battery, or any criminal offense resulting in physical injury or death of one family or household member by another who is or was residing in the same single dwelling unit.
>
> (2) "Family or household member" means spouses, former spouses, persons related by blood or marriage, persons who are presently residing together as if a family or who have resided together in the past as if a family, and persons who have a child in common regardless of whether they have been married or have resided together at any time.
>
> (3) "Department" means the Florida Department of Law Enforcement.
>
> (4) "Law enforcement officer" means any person who is elected, appointed, or employed by any municipality or the state or any political subdivision thereof who meets the minimum qualifications established in s.

"residing." Thus, it is unclear whether a person must be at a residence for a particular period of time in order to reside there or whether staying at a residence only one day a week qualifies as "residing." It is also unclear whether there are certain requirements that both the victim and the perpetrator would have to comply with in order to satisfy the residing requirement.

The 1995 amendments to this section also failed to define the term "residing." However, the amendments extended the definition of domestic violence to clearly include an array of criminal acts.[77] For example, the 1995 amendment changed the section to explicitly define specific conduct or behavior that constitutes domestic violence, such as sexual assault, sexual battery, and stalking.[78] The terms "sexual assault, sexual battery, or any criminal offense, resulting in physical injury or death . . . ."[79] are much more inclusive and powerful. Domestic violence encompasses a wide range of offenses. Therefore, it is different from acts that must involve sexual behavior in order to constitute a crime. Sexual assault and battery are crimes in and of themselves and should not be grouped under any other type of heading, nor should they be limited to acts of domestic violence.

The legislature also failed to define the term "assault." If the spirit of the legislative amendments is to make language powerful, then a powerful definition of "assault" is necessary. For example, by defining the term "assault" as the "fear of bodily harm," this would distinguish assault from a less serious act, such as being screamed at by another. This definition could help policymakers clear the muddy waters that often engulf defining acts of domestic violence.

Subsection 741.28(2) defines "family or household member" as "spouses, former spouses, persons related by blood or marriage, persons who are presently residing together as if a family or who have resided together in the past as if a family, and persons who have a child in common regardless of whether they have been married or have resided together at any time."[80] A definition of the term "residing" should also be included

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943.13 and is certified as a law enforcement officer under s. 943.1395.

Id.

77. Recently, § 741.28 was amended to include aggravated assault, aggravated battery, stalking, and aggravated stalking within the realm of domestic violence. Ch. 95-195, § 1, 1995 Fla. Sess. Law Serv. 1393, 1394 (West) (amending FLA. STAT. § 741.28(1) (Supp. 1994)) (effective July 1, 1995).

78. *Id.*

79. FLA. STAT. § 741.28(1) (Supp. 1994).

80. FLA. STAT. § 741.28(2) (Supp. 1994).

in this section. Nevertheless, the phrase "family or household member" is all-encompassing in that it includes persons who have a child in common regardless of whether they have ever "resided" together. The change from "person's spouse" to "family or household member" reveals the Florida Legislature's desire to protect all members of the home. In fact, it recognizes that domestic violence is not limited to the marital relationship. The language encompasses persons in the household such as nieces, nephews, foster children, or children in temporary custody. The previous statute left many people who were affected by domestic violence unprotected. The fact that the legislature left this definition intact in the 1994 and 1995 legislative sessions signifies its belief that this definition offers the most protection.

D. *Investigating and Reporting Incidents of Violence*

1. Investigation Guidelines

Section 741.29 establishes new guidelines for law enforcement officers who investigate domestic violence cases.[81] This section ensures the rights and remedies of the victim, while also concentrating on the victim's medical needs.[82] The first sentence of the section states that "[a]ny law enforcement officer who investigates an alleged incident of domestic violence shall assist the victim to obtain medical treatment if such is required as a result of the alleged incident to which the officer responds."[83] However, this sentence is vague and raises a number of questions. First, the meaning of the phrase "assist the victim to obtain medical treatment" is both unclear and unspecific. The statute fails to specify: 1) who will pay for the ambulance, hospital, and doctors if the victim cannot; 2) what happens when the victim is afraid to seek the necessary medical attention; and 3) how much discretion does the investigating officer have in assisting the victim. These questions must be addressed. Nevertheless, the first three lines of this subsection offer the victim bold, new, and humane medical assistance when required.

The last sentence of subsection 741.29(1) also contains one of the finest pieces of legislation to originate from the domestic violence statutes. It requires that the notice to the victims, entailing their legal rights and

81. *Id.* § 741.29.
82. *Id.*
83. *Id.* § 741.29(1).

remedies, provide a general summary in simple English or Spanish.[84] There are approximately eighteen million Hispanics in this country, many of whom either live in or visit Florida. In Florida alone, Hispanics comprise almost fourteen percent of the national population of Hispanics. Thus, the use of simple English and Spanish in the notice is significant since not all victims of domestic violence have mastered the English language. Many immigrants speak and understand limited English at best. Furthermore, many people born and raised in the United States will also benefit from the use of simple English rather than complex statutory language.

Ideally, a model notice form would guarantee that each victim receives the same effective communication concerning his or her rights. Some law enforcement agencies have dispensed with this standard model form, while others have not. Thus, the change in the wording of the statute from "as a model form to all law enforcement agencies" to "as a model form to be used by all law enforcement agencies" should have the effect of creating the desired uniformity among the various agencies.

Section 741.29 requires that the notice include a resource listing, including the telephone number for the local domestic violence center designated by the Department of Health and Rehabilitative Services ("HRS").[85] This provision, however, raises several questions. For example, does the resource listing requirement mean that the victim must go through HRS first before going to another center, or does HRS merely give the victim a listing of all abuse centers? By mandating that a resource listing be provided to the victim, the legislature is attempting to induce the victim to obtain the appropriate and necessary counseling.

Paragraph (1)(b) of section 741.29 requires that a copy of the following statement be included in the notice. It states that:

> IF YOU ARE THE VICTIM OF DOMESTIC VIOLENCE, you may ask the state attorney to file a criminal complaint. You also have the right to go to court and file a petition requesting an injunction for protection from domestic violence which may include, but need not be limited to, provisions which restrain the abuser from further acts of abuse; direct the abuser to leave your household; prevent the abuser

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84. *Id.* The section states:

> The [D]epartment [of Law Enforcement] shall revise the Legal Rights and Remedies Notice to Victims to include a general summary of s. 741.30 using simple English as well as Spanish, and shall distribute the notice as a model form to be used by all law enforcement agencies throughout the state.

FLA. STAT. § 741.29(1) (Supp. 1994).

85. *Id.* § 741.29(1)(a).

> from entering your residence, school, business, or place of employment; award you custody of your minor child or children; and direct the abuser to pay support to you and the minor children if the abuser has a legal obligation to do so.[86]

This section sets forth, in straightforward language, several important rights of the victim. Nevertheless, additional punctuation would help clarify the rights specified by the legislature. For example, a colon placed after the phrase "but need not be limited to" would make the sentence more precise. Moreover, successive numbers instead of semicolons would further clarify the various rights. Clearer punctuation would enable the reader to better perceive distinct breaks in the statutory language and would help the reader (and potential victim) to understand that not every sentence necessarily applies to them.

The last sentence, permitting the victim to "direct the abuser to pay support to [the victim] and the minor children if the abuser has a legal obligation to do so[,]"[87] is also confusing. This sentence would be clearer if it included a list of examples that constitute "legal obligations." The provision concerning payment to minor children raises additional unanswered questions, such as, whether payment can be made directly to minor children,[88] and how the children must be related to the abused person. Once these questions are answered, an additional question arises as to whom should the money go. Efforts to simplify this language will, in turn, help victims of domestic violence.

2. Mandatory Written Police Reports

Subsection 741.29(2) requires investigating officers to file a written police report, regardless of whether an arrest was made.[89] Furthermore, the

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86. *Id.* § 741.29(1)(b).

87. *Id.*

88. The answer to this question is probably no.

89. FLA. STAT. § 741.29(2) (Supp. 1994). The statute reads as follows:

> When a law enforcement officer investigates an allegation that an incident of domestic violence has occurred, the officer shall handle the incident pursuant to the arrest policy provided in s. 901.15(7)(a), and as developed in accordance with subsections (3), (4), and (5). Whether or not an arrest is made, the officer shall make a written police report as part of the field arrest and incident reporting form and as prescribed by the department of the alleged incident which clearly indicates that the alleged offense was an incident of domestic violence. Such report must include:
>
> (a) A description of physical injuries observed, if any.

report must contain a description of physical injuries observed by the law enforcement officer, the reasons why an arrest was not made, and a statement indicating that a copy of the legal rights and remedies notice was given to the victim.[90] This last requirement, amended in 1994, is different from the earlier version of the statute because it requires officers to make a statement, in writing, signifying that the victim has received the notice of his or her rights.[91] This, in turn, ensures that the officer will remember to give the victim the notice because the officer must do so in order to properly complete the report.

The legislature revised subsection 741.29(2) to require investigative officers to list the physical injuries observed on the victims.[92] This requirement serves several functions. First, it may later give the officer who responded to the incident an opportunity to refresh his or her memory by referencing certain facts. If a trial results from the incident, specific memories may allow the officer to give specific testimony. Second, the injury report may assist in a medical diagnosis. If a victim of domestic violence refuses treatment for injuries, a detailed report as to the time and cause of the injury may later assist the treating physician in arriving at an accurate diagnosis. This injury report also protects a potential defendant because the statute requires an officer to document the injuries, or the lack

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(b) If an arrest was not made, an indication by the law enforcement officer, in writing, of the reasons why an arrest was not made.

(c) A statement which indicates that a copy of the legal rights and remedies notice was given to the victim.

Whenever possible, the law enforcement officer shall obtain a written statement from the victim and witnesses concerning the alleged domestic violence. The officer shall submit the report to the supervisor or other person to whom the employer's rules or policies require reports of similar allegations of criminal activity to be made. The law enforcement agency shall, without charge, send a copy of the initial police report, which excludes victim/witness statements or other materials that are part of an active criminal investigation and are exempt from disclosure under chapter 119, to the nearest locally certified domestic violence center within 24 hours after the agency's receipt of the report. The report furnished to the domestic violence center must include a narrative description of the domestic violence incident.

Id.

90. *See id.* § 741.29(2)(a)-(c).

91. *See* Ch. 94-135, § 2, 1994 Fla. Laws 750, 752 (amending FLA. STAT. § 741.29(2) (Supp. 1994)).

92. *Id.*

thereof, that result from the domestic violence incident.[93] This prevents a victim from linking an injury resulting from some other cause to the one to which the police responded.

However, there are potential problems with the police documentation requirement. First, a police officer has only his or her training and experience to rely upon when documenting these injuries. Police officers do not always have formal medical training which would allow them to determine the cause of the injury. Second, if the police do not witness the occurrence of the injury, the cause and the surrounding circumstances may pass undetected. However, these potential problems are relatively minor. The legislature has taken important steps to aid in the reporting of domestic violence incidents by the police. Thus, these positives far outweigh any potential negatives.

The practice of requiring officers to include reasons why an arrest was not made serves to prevent any arbitrariness by the investigating officer in handling incidents of domestic violence and to preclude any tendency to treat domestic violence as private family matters.[94] The requirement serves as a policy statement encouraging arrests.

Other positive changes to the law include obtaining written statements from victims and witnesses, and furnishing copies of the initial police report to the domestic violence center within twenty-four hours of the agency's receipt of the report.[95] Obtaining written statements from victims and witnesses allows for better documentation of the incident. By gathering information close to the time of the incident, the officers can more aptly record details while they are still fresh in the minds of the victim and witnesses. Moreover, if the incident leads to a trial, these reports may be used to refresh recollection or even to impeach a witness who changes his or her story.

By providing notice to the domestic violence center, the center can take immediate action in accordance with its policies.[96] The statute also requires that the domestic violence center be provided with a narrative of the incident. This requirement is a change from the previous version of the statute which only required that the police submit a copy of the police report to the center.[97] The purpose behind the old provision was to ensure

93. *See* FLA. STAT. § 741.29(2)(a) (Supp. 1994).

94. *See id.* § 741.29(2)(b).

95. *Id.* § 741.29(2).

96. *See id.*

97. *See* FLA. STAT. § 741.29(2) (1991); *see also* Ch. 91-210, § 2, 1991 Fla. Laws 2040, 2042.

continued integrity of the investigation. However, the 1994 amendment is an important addition because in requiring the narrative, the legislature realized that the more information the centers have about the incident, the more effective their assistance will be. Thus, the legislature appears to have imparted to the police the need for swift action in domestic violence cases.

In 1991, the legislature adopted subsection 741.29(3).[98] This was the first indication of Florida's new pro-arrest stance on domestic violence. The statute, which is unchanged from its original date of enactment, states that:

> Whenever a law enforcement officer determines upon probable cause that an act of domestic violence has been committed within the jurisdiction the officer may arrest the person or persons suspected of its commission and charge such person or persons with the appropriate crime. The decision to arrest and charge shall not require consent of the victim or consideration of the relationship of the parties.[99]

Prior to this addition, the prosecution was forced to accede to the victim's decision not to press charges because any reason offered by the victim for not pressing charges aborted the prosecution. Fear, intimidation, hope of reconciliation, and countless other reasons offered by the victim prevented the prosecution of perpetrators. The 1991 version, however, took the ominous decision of whether to prosecute away from the victim.[100] By allowing prosecutors to go forward with the prosecution over the victim's objections, the legislature is sent the message that the crime is against both the state and the victim, and not just the victim alone.

However, this pro-prosecutorial stance is flawed. Realistically, if a victim does not want to press charges or testify, a prosecutor may not proceed very far because, often, the only witnesses to these actions are the abuser and the victim. Assuming the abuser will not testify against himself, the victim is the only remaining witness. Thus, the victim's refusal to cooperate may thwart the legislature's attempt to initiate a pro-prosecutorial stance.

Subsection 741.29(4) involves a probable cause determination before making an arrest.[101] The section also raises questions because the language is unclear. The statute states that "[w]hen complaints are received

98. Ch. 91-210, § 2, 1991 Fla. Laws at 2042 (codified at FLA. STAT. § 741.29(3) (1991)).

99. FLA. STAT. § 741.29(3) (Supp. 1994).

100. *See* FLA. STAT. § 741.29(3) (1991).

101. FLA. STAT. § 741.29(4) (Supp. 1994).

from two or more parties, the officers shall evaluate each complaint separately to determine whether there is probable cause for arrest."[102]

First, it is not clear whether the phrase "two or more parties" refers to the parties' spouses, witnesses, or children. Second, it is equally unclear which officers evaluate whether probable cause exists. Since the legislature's goal is to eliminate the deference given to the police, more specific language should have been used. A better method would be to require a supervisor or an individual with special experience or training in domestic violence cases to make the probable cause determination.

Finally, subsection 741.29(5) refers to the potential liability of police officers in domestic violence cases.[103] The section provides that "[n]o law enforcement officer shall be held liable . . . for an arrest based on probable cause." Effective July 1, 1995, this section grants police officers civil immunity for good faith enforcement of the court orders and service of process.[104] Therefore, this section encourages arrests where the situation warrants it. Without this immunity from suit, police officers might be reluctant to arrest perpetrators of domestic violence, thus, rendering the legislature's pro-prosecutorial stance ineffective.

E. *Prosecuting Domestic Violence Cases*

Section 741.2901 sets out certain guidelines that all state attorney offices should follow in prosecuting domestic violence cases.[105] The section requires the state attorney's office to take a pro-prosecutorial stance in all cases and to investigate the defendant's history.[106] Subsection 741.2901(1) of this statute states that "[e]ach state attorney shall develop special units or assign prosecutors to specialize in the prosecution of domestic violence cases, but such specialization need not be an exclusive area of duty assignment. These prosecutors, specializing in domestic violence cases, and their support staff shall receive training in domestic violence issues."[107]

Structural changes to this section are necessary to clarify the vague and ambiguous language. For example, the phrase "in smaller counties" could be added after the word "assignment." Thus, larger counties with available

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102. *Id.* § 741.29(4).

103. *Id.* § 741.29(5).

104. Ch. 95-195, § 2, 1995 Fla. Sess. Law Serv. at 1394 (amending FLA. STAT. § 741.29(5) (Supp. 1994)).

105. FLA. STAT. § 741.2901 (Supp. 1994).

106. *Id.*

107. *Id.* § 741.2901(1).

resources would be required to form special prosecutorial units specializing in domestic violence. Smaller counties, on the other hand, could allocate its prosecutors to cases involving domestic violence as well as other areas.

Section 741.2901(1) could also be modified to include specific criteria for training. This would make training uniform throughout the state. For example, after the word "training," the subsection could be revised to state specific expectations during training, including the length of training required, the degree of intensity, and the form of training necessary.

Subsection 741.2901(2) finally addresses the legislature's concern with removing the historical belief that domestic violence is limited to the domain of the family. The 1994 version of the statute provided that:

> It is the intent of the Legislature that domestic violence be treated as an illegal act rather than a private matter, and for that reason, indirect criminal contempt may no longer be used to enforce compliance with injunctions for protection against domestic violence. The state attorney in each circuit shall adopt a pro-prosecution policy for acts of domestic violence . . . . The filing, nonfiling, or diversion of criminal charges shall be determined by these specialized prosecutors over the objection of the victim, if necessary.[108]

The purpose of this section was to end the cycle of tolerance afforded to domestic violence by law enforcement officers and victims alike. This section attempted to abolish the mistaken belief that domestic violence removes the sole provider or breadwinner from the home, effectively breaking up the family and impairing it economically. The law now aims to impart the view that laws are broken when a person takes it upon himself or herself to strike someone or put another's life in jeopardy.

The most significant change to this section of the statute in the last year is evidenced by the recent amendment reimplementing the indirect criminal contempt provision.[109] Section 741.2901(2) had previously prohibited use of indirect criminal contempt as a means of enforcing compliance with the protective injunctions.[110] Under the 1994 version, a violation of an injunction for protection against domestic violence had to be handled by the state attorney's office. Furthermore, it removed the judge's power to hold a respondent in criminal contempt for violating an injunction for protection

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108. *Id.* § 741.2901(2).

109. Ch. 95-195, § 3, 1995 Fla. Sess. Law Serv. at 1395 (amending FLA. STAT. § 741.2901(2) (Supp. 1994)).

110. *See* FLA. STAT. § 741.2901(2) (Supp. 1994).

against domestic violence.[111] However, the 1995 amendment restored the indirect criminal contempt provision as a statutorily recognized enforcement tool. As a result of this amendment, the power to enforce the injunction for protection against domestic violence is once again in the hands of the judiciary. Because the judiciary makes the initial determination of whether an injunction is necessary, it is only natural that the judiciary be responsible for enforcement as well.

Subsection 741.2901(3) requires the state attorney's office to conduct a full investigation into a perpetrator's background specifically searching for past criminal misconduct, including any instances of domestic violence.[112] A thorough investigation provides vital information for the court to determine whether there is a pattern to the violence. The statute requires that "[t]his information shall be presented at first appearance, when setting bond, and when passing sentence, for consideration by the court."[113] These procedural steps enable a judge to make an informed decision about the disposition of the defendant. Accordingly, a judge will know the defendant's history before she sets bond[114] or passes sentence. Furthermore, this knowledge may help a judge decide whether to depart from the sentencing guidelines.

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111. *Id.*

112. *Id.* § 741.2901(3). The statute now provides that:

> Prior to a defendant's first appearance in any charge of domestic violence as defined in s. 741.28, the State Attorney's Office shall perform a thorough investigation of the defendant's history, including, but not limited to: prior arrests for domestic violence, prior arrests for nondomestic charges, prior injunctions for protection against domestic and repeat violence filed listing the defendant as respondent and noting history of other victims, and prior walk-in domestic complaints filed against the defendant. This information shall be presented at first appearance, when setting bond, and when passing sentence, for consideration by the court. When a defendant is arrested for an act of domestic violence, the defendant shall be held in custody until brought before the court for admittance to bail in accordance with chapter 903. In determining bail, the court shall consider the safety of the victim, the victim's children, and any other person who may be in danger if the defendant is released.

Ch. 95-195, § 3, 1995 Fla. Sess. Law Serv. at 1395.

113. FLA. STAT. § 741.2901(3) (Supp. 1994).

114. The 1995 amendment requires that the defendant be brought before a judge and then admitted to bail. The judge must consider the safety of the victim, the victim's children, and anyone else who may be in danger if the defendant is released. Ch. 95-195, § 4, 1995 Fla. Sess. Law Serv. at 1395.

F. *The Role of the Judiciary*

Section 741.2902(1) now states that "[i]t is the intent of the Legislature, with respect to domestic violence cases, that at the first appearance the court shall consider the safety of the victim, the victim's children, and any other person who may be in danger if the defendant is released, and exercise caution in releasing defendants."[115]

This addition to Florida's domestic violence statute is a crucial change. A judge must first consider the safety of the victim, his or her children, or *any other person* who may be in danger, in determining whether to release an abuser. It is clear from this language that the legislature intended to enhance victim safety. Nevertheless, the sentence requiring courts to "exercise caution in releasing defendants" raises significant questions. For example, it is unclear whether this section was intended to be merely a reminder or a directive to judges. The language would have been more instructive if it had listed with specificity the type of caution required; whether a domestic violence offender should be treated differently than any other violent offender; or whether a trial court can deny pretrial releases in domestic violence cases where one is charged with a misdemeanor battery, detention for which is based on a threat of harm.

The court in *Swanson v. Allison*[116] was called upon to decide similar questions involving this statute. In *Swanson*, the defendant was arrested for "domestic violence battery," the statutory equivalent of simple battery.[117] During first appearance, the judicial officer detained the defendant and ordered a domestic violence investigation. The defendant then filed a petition for writ of habeas corpus to obtain his pretrial release. The defendant was subsequently granted this release.[118]

In making its determination, the court first looked at the *Constitution of Florida*.[119] The court held that:

> The Constitution of the state of Florida provides that every person charged with a non-capital offense not punishable by life imprisonment is entitled to pre-trial release on reasonable conditions . . . . Before denying pre-trial release because of the threat of harm to the community, the court must make several findings, including that the present charge is a "dangerous crime." Although the Legislature's definition of

115. *Id.* (amending FLA. STAT. § 741.2902 (Supp. 1994)).
116. 617 So. 2d 1100 (Fla. 5th Dist. Ct. App. 1993).
117. *Id.* at 1100.
118. *Id.*
119. *Id.* at 1100-01.

> "dangerous crime" includes the felony offense of aggravated battery, we find no constitutional or statutory authority for denying pre-trial release to one charged with misdemeanor battery, where the detention is based on a threat of harm finding.[120]

The court further held that if section 741.2902(1) is being used to detain those charged with simple batteries arising from domestic disputes, "the statute is being unconstitutionally applied."[121] The court was troubled by the charge of "domestic violence battery" and the subsequent use of this term.[122]

> [The defendant] was arrested and charged with "domestic violence battery," there is no such statutory offense. It appears that certain law enforcement officials, prosecution units, and courts have in effect created the offense of "domestic violence battery" to place the burden on those arrested to demonstrate that pre-trial release would pose no threat of harm.[123]

The court drew a definite line between felony and misdemeanor pretrial release.[124] It failed to see any distinction between misdemeanor battery resulting from domestic violence and misdemeanor battery resulting from any other incident.[125] The court stated that:

> When a person is charged with a serious offense arising out of a domestic dispute, such as aggravated battery, we have no qualms with pre-trial detention if the state can prove the necessity for such action. However, any policy authorizing the denial of pre-trial release for those charged with simple battery based on a finding of potential harm is unconstitutional.[126]

This case seems to stand for the proposition that in the eyes of the court, as far as pretrial release is concerned, a stricter standard does not necessarily apply simply because an offense involves domestic violence.

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120. *Id.* at 1100 (citations omitted).
121. *Swanson*, 617 So. 2d at 1101.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Swanson*, 617 So. 2d at 1101.

Subsection 741.2902(2) relates to protective injunctions in domestic violence situations.[127]

Paragraph (a) requires judges to first consider the safety of the victim of domestic violence first.[128] It allows the judge to remove the perpetrator of the violence from the home, separating the parties and allowing the victim to remain at home. Thus, it is the perpetrator who must find another place to stay and not the victim. The recent amendments to this subsection further emphasize the importance of the victim's safety by requiring the judge to note the inherent danger in allowing the respondent even partial access to the house.[129]

Paragraph (b), requiring the parties to understand the terms of the injunction, is also important because it protects the rights of both the victim and the perpetrator. In requiring the court to ensure that both parties understand the terms of the injunction and the penalties for noncompliance, the victim is better protected because she knows exactly what the perpetrator of

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127. FLA. STAT. § 741.2902(2) (Supp. 1994). The subparts to subsection 741.2902(2) now read as follows:

> (a) Recognize that the petitioner's safety may require immediate removal of the respondent from their joint residence and that there can be inherent danger in permitting the respondent partial or periodic access to the residence.
>
> (b) Ensure that the parties have a clear understanding of the terms of the injunction and the penalties for failure to comply, and that the parties cannot amend the injunction verbally, in writing, or by invitation to the residence.
>
> (c) Ensure that the parties have knowledge of legal rights and remedies including, but not limited to visitation, child support, retrieving property, and counseling, and enforcement or modification of the injunction.
>
> (d) Consider temporary child support when the pleadings raise the issue and in the absence of other support orders.
>
> (e) Consider supervised visitation, withholding visitation, or other arrangements for visitation that will best protect the child and petitioner from harm.
>
> (f) Consider requiring the respondent to pay, to the clerk of the court and sheriff, filing fees and costs waived pursuant to s. 741.30(2)(a), or to reimburse the petitioner for filing fees and costs paid by the petitioner.
>
> (g) Enforce, through a civil or criminal contempt proceeding, a violation of an injunction for protection against domestic violence.
>
> (h) Consider requiring the perpetrator to complete a batterers' intervention program. It is preferred that such program be certified under section 16 of this act.

Ch. 95-195, § 4, 1995 Fla. Sess. Law Serv. at 1395-96.

128. FLA. STAT. § 741.2902(a) (Supp. 1994).

129. *See* Ch. 95-195, § 4, 1995 Fla. Sess. Law Serv. at 1395 (amending FLA. STAT. § 741.2902(2)(a) (Supp. 1994)).

the violence can and cannot do. This section also protects the perpetrator by ensuring that he understands what the injunction means, and precludes any subsequent arguments that one or more terms were misunderstood. Another important provision within paragraph (b) is the recent amendment prohibiting parties from amending "the injunction verbally, in writing, or by invitation to the residence."[130]

Paragraph (c) requires the judicial system to ensure that all parties involved are apprised of their rights.[131] This is important because many victims of domestic violence are not always informed of their rights and may be too afraid to file charges in situations where the police were not involved. The remainder of section 741.2902 mandates the court to consider a number of factors before issuing an injunction. Namely, the court must consider: 1) temporary child support for the children affected by domestic violence;[132] 2) visitation rights, focusing on the interests of the child;[133] and 3) who should pay the filing fees and court costs.[134] The statute recommends that the court either charge the respondent with responsibility for any fees waived by statute or reimburse the petitioner for fees and costs previously paid.[135]

The recent amendments by the legislature reimplementing an indirect criminal contempt provision also affected subsection 741.2902(2)(g). This section provides judges with a powerful tool in enforcing protective injunctions. The statute is further strengthened by the additional provision suggesting that courts "[c]onsider requiring the perpetrator to complete a

130. *Id.* (amending FLA. STAT. § 741.2902(2)(b) (Supp. 1994)).

131. FLA. STAT. § 741.2902(2)(c) (Supp. 1994).

132. *Id.* § 741.2902(2)(d). Paragraph (d) makes sure that the children are supported and provided for. Although children may not be direct victims of domestic violence, children are certainly indirect victims. When one parent has to leave the home because of a court order, the judge must consider and provide for the support of the children.

133. *Id.* § 741.2902(2)(e). Paragraph (e) accomplishes two things. First, the language focuses on the safety of the children and victim by avoiding potentially high risk situations. Second, the language provides for the safety of the victim and the children during visitation. If the children's safety is in jeopardy, visitation can be denied. Visitation must take place in such a way as to "best protect the child and the petitioner from harm." *Id.* This sentence ensures that the victim will not be put in the same situation that led to the violence in the first place.

134. *Id.* § 741.2902(2)(f).

135. FLA. STAT. § 741.2902(2)(f) (Supp. 1994). Paragraph (f) specifically requires the court to consider whether the respondent should pay for all of the court filing fees. *Id.* Since the court considers the financial status of both parties in making its determination, it is logical to consider the economic burden carried by the victim, especially a victim with children.

batterers' intervention program."[136] These additions allow for stronger enforcement of the protective injunctions.

G. *Protective Injunctions*

1. Statewide Procedures

Subsections 741.30(1)(a) and (b) previously defined terms contained within this statute.[137] However, the July 1994 amendments deleted the definitions of both "domestic violence" and "family or household member" and placed them in section 741.28 instead.[138] In deleting these definitions from section 741.30, the legislature made reading the statute a bit cumbersome. Because this statute is long and cumbersome, the omission of these terms now requires the reader to turn repeatedly to another section to glean their meaning.

In subsection 741.30(1), the legislature created a cause of action for an injunction for protection against domestic violence.[139] Paragraph (a) of the section gives standing to the victim or potential victim of domestic violence to petition the court for protection.[140] So long as a petitioner has a cause of action, the law mandates that the court hear the action.

Paragraph (e) of this section defines who may bring a cause of action. The statute states that "[t]his cause of action for an injunction may be sought by family or household members. No person shall be precluded from seeking injunctive relief pursuant to this chapter solely on the basis that such person is not a spouse."[141] Paragraph (e) is very important because it adds the phrase "by family or household members," which includes unmarried persons. A broad interpretation of this section means that many different categories of people will be allowed to seek injunctive relief. Thus, the legislature recognized that people other than married couples live

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136. Ch. 95-195, § 4, 1995 Fla. Sess. Law Serv. at 1396 (to be codified at FLA. STAT. § 741.2902(2)(h)).

137. FLA. STAT. § 741.30 (1991).

138. Ch. 94-135, § 1, 1994 Fla. Laws at 751.

139. FLA. STAT. § 741.30(1)(a), (e) (Supp. 1994).

140. *Id.* § 741.30(1)(a). Paragraph (a) of the section states that:

> Any person described in paragraph (e), who is the victim of any act of domestic violence, or has reasonable cause to believe he or she is about to become the victim of any act of domestic violence, has standing in the circuit court to file a sworn petition for an injunction for protection against domestic violence.

Id.

141. *Id.* § 741.30(1)(e).

together in domestic settings. This section demonstrates the legislature's realization that many people may be victims of domestic violence and should, therefore, be afforded proper protection.

The legislature, in its aim to protect victims of domestic violence, also provides victims with the right to obtain an injunction for protection regardless of whether they can afford it. Subsection 741.30(2)(a) provides, in pertinent part, that:

> In the event the victim does not have sufficient funds with which to pay filing fees to the clerk of the court or service fees to the sheriff *or law enforcement agency* and signs an affidavit stating so, the fees shall be waived by the clerk of court or the sheriff *or law enforcement agency* to the extent necessary to process the petition and serve the injunction, subject to a subsequent order of the court relative to the payment of such fees.[142]

After the last word "fees" in this paragraph, however, the section should state "pursuant to section 741.2902(2)(f)." Section 741.2902(2)(f) requires the court to consider making the respondent pay the specified fees.[143] By referencing to section 741.2902(2)(f), the reader will better understand which fees the judge should consider.

In its July 1994 amendments, the legislature twice added the phrase "or law enforcement agency" in section 741.30(2)(a).[144] Previously, the only law enforcement officer mentioned in this section was the sheriff. Now all law enforcement agencies are named or referenced. This addition is important because by enhancing this section with "law enforcement agency," it means that any person who is elected, appointed, or employed by any municipality meeting the minimum qualifications established in section 943.13, and who is certified as a law enforcement officer under section 943.1395, can waive fees. Before the July 1994 amendments, only the clerk of the court or the sheriff had the authority to waive fees.

Subsection 741.30(2)(c), establishing duties of the clerk of the court, was revised in 1995.[145] The section provides new and expanded duties of

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142. *Id.* § 741.30(2)(a) (emphasis added).

143. FLA. STAT. § 741.2902(2)(f) (Supp. 1994).

144. Ch. 94-135, § 5, 1994 Fla. Laws at 755.

145. Ch. 95-195, § 5, 1995 Fla. Sess. Law Serv. at 1396. Section 741.30(2)(c) now provides:

> 1. The clerk of the court shall assist petitioners in seeking both injunctions for protection against domestic violence and enforcement for a violation thereof as specified in this section.

the clerk of court in an effort to ease the process for the victim. For example, this new section entitles petitioners to assistance in both seeking injunctions and enforcing violations of such injunctions.[146] The new section left unchanged the requirement that clerk must advise petitioners that affidavits waiving filing fees are available in instances of insolvency and indigence.[147] Without this knowledge, a victim might conclude that a lack of money prevents them from getting assistance. However, the section fails to offer examples of how the clerk might assist the petitioner. Thus, language should be added to better define the clerk's role in assisting the petitioner. The legislature should add the phrase "and assistance in their completion, if necessary," at the end of the sentence in paragraph (1) so the petitioner can be assured that assistance is available.

The remaining paragraphs within this subsection should also be modified. To clarify the wording of the statute and reduce excess verbiage, everything past the word "injunction" in paragraph (4) should be stricken. The legislature should also define the phrase "privacy to the extent practical." This phrase is vague because it fails to address how much privacy the victim is to receive or whether the victim should be behind

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2. All clerks' offices shall provide simplified petition forms for the injunction, any modifications, and the enforcement thereof, including instructions for completion.

3. The clerk of the court shall advise petitioners of the availability of affidavits of insolvency or indigence in lieu of payment for the cost of the filing fee, as provided in paragraph (a).

4. The clerk of the court shall ensure the petitioner's privacy to the extent practical while completing the forms for injunctions for protection against domestic violence.

5. The clerk of the court shall provide petitioners with a minimum of two certified copies of the order of injunction, one of which is serviceable and will inform the petitioner of the process for service and enforcement.

6. Clerks of court and appropriate staff in each county shall receive training in the effective assistance of petitioners as provided or approved by the Florida Association of Court Clerks.

7. The clerk of the court in each county shall make available informational brochures on domestic violence when such brochures are provided by local certified domestic violence centers.

8. The clerk of the court in each county shall distribute a statewide uniform informational brochure to petitioners at the time of filing for an injunction for protection against domestic or repeat violence when such brochures become available.

Id.

146. *Id.* (to be codified at FLA. STAT. § 741.30(2)(c)1.).

147. FLA. STAT. § 741.30(2)(c)3. (Supp. 1994).

closed doors while filing charges. The victim's privacy is very important. Thus, an important step in ensuring the victim's privacy might be to enact legislation specifically aimed at preventing the victim's name from becoming public record.

Section 741.30(2)(c) also requires training for the clerk of the court and the members of the staff to effectively assist petitioners.[148] However, the legislature should define the phrase "effective assistance" as it is used in the statute. For example, the statute should list whether a minimum standard is to be applied in administering assistance. Paragraph (2)(c)(7) of section 741.30, which requires the availability of informational brochures on domestic violence, should also be clarified.[149] The statute should specify whether these brochures are the same as the Legal Rights and Remedies Notice given out at the initial police call. If the documents are the same, then it should be noted in the statute. If not, then the specific differences between the two documents should be explicitly stated. Perhaps the biggest criticism of the brochure requirement is the brochure's availability. The statute states that brochures are provided "when such brochures become available."[150] This is unacceptable because brochures should be provided *whenever* the police encounter a victim.

2. The Petition for Injunction

Section 741.30(3)(b) exemplifies the form of the petition for injunction for protection against domestic violence.[151] The statute's language in this section should also be modified. Section 741.30(3), which presently states that "[t]he sworn petition shall be in substantially the [same] form," could be replaced with the provision "all petitions, throughout Florida, shall have at least this much information and can have more, but not less," in order to protect the victim's rights. This modification would leave no doubt as to how much information would be required to be furnished in order for the form to be complete. Because the word "shall" is directive, it implies that the form's use should conform to that provided by the law.

In 1992, the legislature adopted a broader definition of "respondent" in the petition. This definition remained unchanged in the 1994 and 1995 amendments. A respondent is defined as "a person with whom the petitioner has a child in common, regardless of whether the petitioner and

148. *Id.* § 741.30(2)(c)6.
149. *Id.* § 741.30(2)(c)7.
150. *Id.* § 741.30(2)(c)8.
151. *Id.* § 741.30(3)(b).

respondent are or were married or residing together, as if a family."[152] Consequently, this definition includes within the purview of domestic violence, acts perpetrated on either a mother or a father by the other parent. It is no longer relevant whether the petitioner and respondent lived together or were married at any time. This section also provides protection for both the victim and the children of the victim. The legislature recognized, perhaps for the first time, that domestic violence can occur without two people ever having lived together.

Section 741.30 also provides the court with the discretion to issue an injunction based upon information contained in the petition.[153] The 1994 amendments added language invoking clarity of the court's decisions. Prior to 1994, there was no difference between immediately restraining and restraining the respondent. The 1994 amendment created the distinction between whether the petitioner was seeking an injunction "immediately restraining the respondent from committing any acts of domestic violence," and "[r]estraining the respondent from committing any acts of domestic violence." Why would the defendant be immediately restrained in some cases and not in others? The 1994 amendment answered this question by providing that "[w]hen it appears to the court that an immediate and present danger of domestic violence exists, the court may grant a temporary injunction ex parte . . . ."[154]

Subsection 741.30(6)(a) provides ex parte relief for victims.[155] It permits the court to award "to the petitioner the exclusive use and possession of the dwelling that the parties share or excluding the respondent from the residence of the petitioner."[156] The provision excluding the respondent from the petitioner's residence should be stricken, however, because it is unnecessary. Awarding the petitioner temporary exclusive use and possession of the residence would achieve the same result.

The provision in subsection (6)(a)(4), "establishing temporary support for a minor child or children or the petitioner," also needs to be modified. The words "and/or" should be substituted for the word "or" directly before the phrase "the petitioner."[157] This change would clarify that the support is for both the child and the petitioner.

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152. FLA. STAT. § 741.30(3)(b) (Supp. 1994).
153. *Id.* § 741.30(3)(b).
154. *Id.* § 741.30(5)(a).
155. *Id.* § 741.30(6)(a).
156. *Id.* § 741.30(6)(a)2.
157. FLA. STAT. § 741.30(6)(a)4. (Supp. 1994).

In addition to the above modification, the treatment of the respondent should be more forceful than the statute currently provides. Section 741.30(6)(a)(5) states that the court may order the "respondent to participate in treatment or counseling services."[158] This should be an automatic requirement and not merely a factor for the court to consider.

The section addressing ex parte injunctions provides that:

> Any such ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days. A full hearing, as provided by this section, shall be set for a date no later than the date when the temporary injunction ceases to be effective. The court may grant a continuance of the ex parte injunction and the full hearing before or during a hearing for good cause shown by any party, which shall include a continuance to obtain service of process.[159]

This section is a modification of the 1992 version addressing ex parte injunctions. The 1994 amendments changed the requirements of the section by reducing the number of days from thirty to fifteen that a temporary injunction may be effective.[160] This reduction allows for quicker review of the petition and a faster ruling by the administering judge. Thus, the legislature attempted to make the temporary injunction more equitable for the respondent. The reduction in time in issuing a temporary injunction also may create additional rights for the respondent.

For example, prior to 1994, a respondent could be forced to stay away from his or her home for thirty days without a hearing. A month is a significant period of time to be kept away from one's home. The sequence of events also complicates matters. An injunction can be issued by a judge without the respondent ever being present. The judge simply looks at the affidavit and signs the order. Obviously, the affidavit would be written from the petitioner's perspective. Consequently, the respondent may not get a chance to present his side of the story until a hearing date is set thirty days later. Thus, the fifteen-day requirement effectively relieves the respondent of such inconveniences.

On the other hand, a strong argument exists in opposition to the legislature's reduction in time. For example, the sheriff has the duty to

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158. *Id.* § 741.30(6)(a)5. The section was recently amended to read "ordering the respondent to participate in treatment, *intervention*, or counseling services." Ch. 95-195, § 5, 1995 Fla. Sess. Law Serv. at 1399 (emphasis added).

159. *Id.* at 1398 (amending FLA. STAT. § 741.30(5)(c) (Supp. 1994)).

160. *Id.*

serve process upon the defendant. Often the sheriff is inundated with other service requests, hence delaying the process further. Where a defendant is elusive, further delay in locating him adds to the time needed to effect proper service of process. Therefore, fifteen days may be too short a time in which to serve a defendant. Once the fifteen days elapse, the injunction terminates, leaving the victim unprotected. The reduction in time from thirty days to fifteen days, therefore, might result in a gain of rights for the respondent and a loss of rights for the victim. Thus, the legislature may want to consider reinstating the thirty-day limit so as not to divest the victim of any necessary protection. The 1995 amendments alleviate this problem slightly because the statute now gives the issuing judge the discretion in determining an applicable time period for continuance of the service of process period.[161]

Another important provision of section 741.30 requires the clerk of the court to furnish certain material to the respondent. Subsection 741.30(7)(a)(1) states that:

> The clerk of the court shall furnish a copy of the petition, financial affidavit, uniform child custody jurisdiction act affidavit, if any, notice of hearing, and temporary injunction, if any, to the sheriff or a law enforcement agency of the county where the respondent resides or can be found, who shall serve it upon the respondent as soon thereafter as possible on any day of the week and at any time of the day or night. . . . *Notwithstanding any other provision of law to the contrary, the chief judge of each circuit, in consultation with the appropriate sheriff, may authorize a law enforcement agency within the jurisdiction to effect service. A law enforcement agency serving injunctions pursuant to this section shall use service and verification procedures consistent with those of the sheriff.*[162]

The phrase "as soon thereafter as possible on any day of the week and at any time of the day or night" is an excellent addition because flexibility is always helpful when working within a prescribed period of time. The law enforcement officer must serve the respondent within the allotted fifteen days up to the time of the hearing.[163]

The provision allowing the chief judge to authorize a specific law enforcement agency to effect the service will help eliminate confusion as to

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161. *Id.*

162. *Id.* at 1399 (amending FLA. STAT. § 741.30(7)(a)1. (Supp. 1994)) (emphasis added).

163. FLA. STAT. § 741.30(7)(a)1. (Supp. 1994).

which law enforcement agency should administer the service. If one agency handles all such service, it would streamline and speed the service process. One change should be made, however. The chief judge should be required to authorize an agency to administer the service. This would ensure uniformity among the circuits. Furthermore, it would ensure that the new approach adopted by the legislature would be carried out.

Subsection 741.30(7)(b) prioritizes domestic violence as a serious offense. Of the many functions required of law enforcement officers, this section significantly demonstrates the assistance provided to victims. For instance, the law requires immediate service of the petition by law enforcement officers. Furthermore, it orders law enforcement officers, upon the victim's request, to accompany victims and assist them in obtaining possession of or retrieving personal property from a dwelling.

The 1994 amendments changed section 741.30(7)(b) to read in part:

> There shall be created a Domestic and Repeat Violence Injunction Statewide Verification System within the Department of Law Enforcement. The department shall establish, implement, and maintain a statewide communication system capable of electronically transmitting information to and between criminal justice agencies relating to domestic violence injunctions and repeat violence injunctions issued by the courts throughout the state. Such information must include, but is not limited to, information as to the existence and status of any injunction for verification purposes.[164]

This paragraph is extremely important because law enforcement agencies will now have information at their fingertips about domestic violence injunctions on a statewide basis. For example, an injunction issued in Tampa can be quickly and easily verified in Miami.

Other additions to the statute include a twenty-four-hour time period during which certain tasks must be accomplished.[165] For example, under the 1995 amendments, the court may continue or extend an injunction.[166] If it elects to do so, the clerk of court must forward a copy of the injunction to the sheriff for service within twenty-four hours.[167] Once the respondent has been served, the officer must forward written proof of service to the

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164. *Id.* § 741.30(7)(b).

165. *Id.* § 741.30(7)(c).

166. Ch. 95-195, § 5, 1995 Fla. Sess. Law Serv. at 1400. This is different from the 1994 law which specified that a copy of the injunction must be sent to the sheriff if the court *issues*, *vacates*, or *changes* an injunction. *See* FLA. STAT. § 741.30(7)(c)1. (Supp. 1994).

167. *Id.*

clerk. The sheriff is then required to make information relating to the injunction available to all other law enforcement agencies electronically. Once the respondent has been served, he or she is required to appear before the court.

As a result of the 1995 amendments, courts are now required to enforce a violation of an injunction for protection through either a civil or criminal contempt proceeding.[168] As a result of the amendments, there are three enforcement options available to circuit court judges: 1) civil contempt; 2) criminal contempt; and 3) prosecution for a criminal violation under section 741.30 or any other criminal statute.[169] Paragraph (8)(a) of section 741.30 also directs the monies collected from a monetary assessment or fine imposed by the court be placed in the state treasury for deposit in the marriage license trust fund established in section 741.01.[170]

3. Violation of Protective Injunctions

The 1994 and 1995 amendments to section 741.31 give a future respondent notice as to what constitutes a violation of an injunction for protection against domestic violence.[171] It makes it a violation of the injunction if the perpetrator returns to the petitioner's residence, school, job, or any other place frequented by the petitioner or a family or household member.[172] This section makes clear exactly what property is covered by statute. Subsection (4)(c) of the statute makes committing an act of

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168. Ch. 95-195, § 5, 1995 Fla. Sess. Law Serv. at 1400 (amending FLA. STAT. § 741.30(8)(a) (Supp. 1994)).

169. *Id.*

170. *Id.*

171. Under the 1995 amendments, subsection 741. 31(4) now reads as follows:

> A person who willfully violates an injunction for protection against domestic violence . . . by:
>
> (a) Refusing to vacate the dwelling that the parties share;
>
> (b) Going to the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;
>
> (c) Committing an act of domestic violence against the petitioner;
>
> (d) Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner; or
>
> (e) Telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party . . . .

Id. at 1401 (amending FLA. STAT. § 741.31(4) (Supp. 1994)).

172. *Id.* (to be codified at FLA. STAT. § 741.31(4)(d)).

domestic violence against the petitioner a violation of the injunction.[173] This further enhances the ability of the court to punish an offender for committing an act of domestic violence. Now the respondent who commits a second act of domestic violence will not only face the initial charge of domestic violence, but will also face a misdemeanor charge for violating the injunction. Subsection (4)(d) also makes a respondent's threat of violence toward a petitioner, who is already protected by an injunction, a violation.[174]

Section 784.046 of the *Florida Statutes* establishes a domestic violence injunction statewide verification system, providing for a twenty-four-hour time limit on certain actions by the clerk of the court and law enforcement agencies.[175] The 1995 amendments provide enforcement through civil or criminal contempt proceedings for a violation of an injunction for protection.[176]

H. *Lawful Arrests without Warrants*

Section 901.15 provides guidelines for arrests without warrants in domestic violence cases.[177] The 1995 amendments to the section permit law enforcement officers to make arrests where "[t]here is probable cause to believe that the person has committed a criminal act . . . which violates an injunction for protection . . . over the objection of the petitioner . . . ."[178] The phrase "over the objections of the petitioner" is an improvement because it protects other family members, as well as the victim.[179] In addition, the new statutory language removes the gender biased pronoun "he," which assumed that all police were male.

The 1995 amendments also changed the language in subsection (7)(a), making an arrest permissible where:

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173. Ch. 95-195, § 6, 1995 Fla. Sess. Law Serv. at 1401 (to be codified at FLA. STAT. § 741.31(4)(c)).

174. *Id.* (to be codified at FLA. STAT. § 741.31(4)(d)).

175. FLA. STAT. § 784.046 (Supp. 1994).

176. Ch. 95-195, § 6, 1995 Fla. Sess. Law Serv. at 1401 (amending FLA. STAT. § 741.31(2) (Supp. 1994)).

177. FLA. STAT. § 901.15 (Supp. 1994).

178. Ch. 95-195, § 20, 1995 Fla. Sess. Law Serv. at 1408 (amending FLA. STAT. § 901.15(6) (Supp. 1994)). The amendment deleted the provision that the violent act create "a threat of imminent danger to the petitioner or household members." *Id.*

179. *See* discussion *supra* part III.C.

> There is probable cause to believe that the person has committed an act of domestic violence, as defined in s. 741.28, or child abuse, as defined in s. 827.04(2) and (3), or any battery upon another person, . . . and the law enforcement officer reasonably believes that there is danger of violence unless the person alleged to have committed the act of domestic violence, or child abuse, or battery is arrested without delay.[180]

The phrase "[t]here is probable cause to believe that the person" shows that gender bias has been stricken from the language of this section as well. Moreover, this section broadens the arrest powers of the police because it effectively allows law enforcement officers, upon finding probable cause, to make an arrest without delay. A law enforcement officer no longer has to observe actual bruises or have corroborating witnesses to make an arrest.

A comparison of subsections 901.15(6) and (7) of the statute demonstrates a similar substantive quality in regard to the "probable cause" issue. Subsection 901.15(6) surrounds the issue of "commit[ting] a criminal act . . . which violates an injunction"[181] whereas section 901.15(7) identifies "that the person has committed an act of domestic violence . . . ."[182]

Subsection 901.15(8) was re-enacted by the 1994 legislative amendments but was not changed by 1995 legislative enactments. Referring to law enforcement officers, the statute states that "[h]e has probable cause to believe that the person has knowingly committed an act of repeat violence in violation of an injunction for protection from repeat violence . . . ."[183] The 1994 amendment is inconsistent with the provisions in other parts of the statute because it uses the gender biased word "he" when referring to police officers. The legislature should remove the word "he" throughout the entire statute to render all sections consistent.

I. *Uniform Statewide Policies and Procedures*

Section 943.1701 mandates the creation of uniform statewide policies in the area of domestic violence and requires that they be implemented into basic law enforcement training and continuing education programs.[184]

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180. Ch. 95-195, § 20, 1995 Fla. Sess. Law Serv. at 1409 (amending FLA. STAT. § 901.15(7)(a) (Supp. 1994)).

181. *Id.* (amending FLA. STAT. § 901.15(6) (Supp. 1994)).

182. *Id.* (amending FLA. STAT. § 901.15(7)(a) (Supp. 1994)).

183. FLA. STAT. § 901.15(8) (Supp. 1994).

184. *Id.* § 943.1701 (1993). The statute requires that the statewide policies and procedures include:

This section is important because it requires the police to become familiar with the many issues inherent in and raised by domestic violence. Although the legislature writes the statutes, it is up to the police to enforce them. To properly enforce domestic violence statutes, police must not only become familiar with the statutes, but they must also become familiar with the topic of domestic violence.

Although all of the provisions of this section are important, only a few require mentioning. Subsection 943.1701(3) helps the officer to insure both his or her own safety, as well as the safety of the victim. Domestic violence situations may be volatile. Thus, responding officers require special skills when responding to cases involving domestic violence.[185] This section requires the officer to be educated in ways which will reduce the chance of danger for everyone involved.

Subsection 943.1701(4) requires officers to learn about the extent of the causes of domestic violence.[186] Such an understanding may help the

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(1) The duties and responsibilities of law enforcement in response to domestic violence calls, enforcement of injunctions, and data collection.

(2) The legal duties imposed on law enforcement officers to make arrests and offer protection and assistance, including guidelines for making felony and misdemeanor arrests.

(3) Techniques for handling incidents of domestic violence that minimize the likelihood of injury to the officer and that promote safety of the victim.

(4) The dynamics of domestic violence and the magnitude of the problem.

(5) The legal rights of, and remedies available to, victims of domestic violence.

(6) Documentation, report writing, and evidence collection.

(7) Tenancy issues and domestic violence.

(8) The impact of law enforcement intervention in preventing future violence.

(9) Special needs of children at the scene of domestic violence and the subsequent impact on their lives.

(10) The services and facilities available to victims and batterers.

(11) The use and application of sections of the Florida Statutes as they relate to domestic violence situations.

(12) Verification, enforcement, and service of injunctions for protection when the suspect is present and when the suspect has fled.

(13) Emergency assistance to victims and how to assist victims in pursuing criminal justice options.

(14) Working with uncooperative victims, when the officer becomes the complainant.

Id.

185. *Id.* § 943.1701(3).

186. *Id.* § 943.1701(4).

officer realize that a domestic violence problem he or she encounters is not just an isolated "family situation," but is an epidemic that affects the population at large. This insight into the causes of domestic violence is very important because one cannot expect an officer to deal effectively with a situation unless the officer first understands it. Subsection 943.1701(6) mandates that officers understand the dynamics of documenting, reporting, and evidence collection as they pertain specifically to the area of domestic violence.[187] This subsection impresses upon the officer that management of domestic violence cases requires special procedures.

Subsection 943.1701(9) addresses an important point about "the subsequent impact on [children's] lives."[188] This is the first positive point about children's issues raised in Florida's revised statutes. Subsection (9) is one of the few statutes that addresses the uniqueness of children's needs in domestic violence.

Finally, the importance of subsection 943.1701(14) must be impressed upon law enforcement officers because under the state's new pro-prosecutorial policy, officers no longer need the cooperation of the victim to press charges. This section requires police officers to work with uncooperative victims when the *officer* becomes the complainant.[189] Thus, if the state's pro-prosecutorial policy is to be effective, it is imperative that the police learn about this area in the event they become the complainant.[190]

J. *Collection of Statistics on Domestic Violence*

Section 943.1702 states that:

> (1) In compiling the Department of Law Enforcement Crime in Florida Annual Report, the department shall include the results of the arrest policy . . . with respect to domestic violence to include: separate statistics on occurrences of and arrests for domestic versus nondomestic violence . . . .
> (2) Each agency in the state which is involved with the enforcement, monitoring, or prosecution of crimes of domestic violence shall collect and maintain records of each domestic violence incident for access by investigators preparing for bond hearings and prosecutions for acts of

187. FLA. STAT. § 943.1701(6) (1993).

188. *Id.* § 943.1701(9).

189. *Id.* § 943.1701(14) (emphasis added).

190. The language of this subsection is a bit confusing. The legislature should clarify when an officer becomes a "complainant."

> domestic violence. This information shall be provided to the court at first appearance hearings and all subsequent hearings.[191]

Subsection 943.1702(1) assists the authors of the *Department of Law Enforcement Crime in Florida Annual Report* in analyzing statistics about domestic violence. Specifically, the frequency of domestic violence crimes can be compared and contrasted with other violent crimes. By comparing the number of domestic violence cases reported, the number of domestic violence arrests made, and the number of times the officer rather than the victim is the complainant, the effectiveness of the new statutes can be analyzed.

Subsection 943.1702(2) is also a positive step because it provides relevant information to investigators and the court. One criticism of this section, however, is that these statistics should be provided not only to law enforcement agencies and investigators, but to anyone wishing to have access to them. Statistics on domestic violence should become public records. This would enable civilian specialists to analyze the material and would, in turn, allow experts such as university professors the opportunity to either comment on or criticize the statistics.

K. *Children's Issues*

Section 61.13 addresses the custody and support of children, visitation rights, and the power of court in making orders.[192] The statute provides that:

> The court shall consider evidence that a parent has been convicted of a felony of the second degree or higher involving domestic violence . . . as a rebuttable presumption of detriment to the child. If the presumption is not rebutted, shared parental responsibility, including visitation, residence of the child, and decisions made regarding the child, shall not be granted to the convicted parent. However, the convicted parent shall not be relieved of any obligation to provide financial support.[193]

The language in this section is a strong addition to the statute because it provides additional protection for children. The legislature recognizes that children do not belong with parents convicted for acts of domestic violence.

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191. FLA. STAT. § 943.1702 (1993).
192. *Id.* § 61.13 (Supp. 1994).
193. *Id.* § 61.13(2)(b)(2).

It is unconscionable to think that a person charged with abusing another adult could be awarded custody of a child. Accordingly, the court must now consider any domestic violence offenses when determining the custody of a child. Furthermore, the legislature provided for the financial welfare of the child through the addition of the last sentence denying the convicted parent relief from his or her obligations to provide financial support.[194] A child should not have to forego basic necessities.

L. *Stalking*

Section 784.048(4) relates to stalking. The statute states that:

> Any person who, after an injunction for protection against repeat violence . . . or an injunction for protection against domestic violence . . . or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows or harasses another person commits the offense of aggravated stalking, a felony of the third degree . . . .[195]

This section further protects victims of domestic violence. Instead of merely violating the injunction, the respondent can also commit a felony by stalking the petitioner. Additionally, even if the respondent does not make actual contact with the petitioner's person or property, the respondent may still be guilty of stalking. This stalking provision should provide for even more distance between the victim of domestic violence and his or her assailant.

IV. ELIMINATING THE TERM "DOMESTIC VIOLENCE"

The Florida Legislature defines "domestic violence" as "any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, or any criminal offense resulting in physical injury or death of one family or household member by another who is or was residing in the same single dwelling unit."[196] Language is the ability to communicate thoughts and feelings through vocal sound.[197] Does the combination of the words "domestic violence" effectively communicate and

194. *Id.*
195. *Id.* § 784.048(4).
196. Ch. 95-195, § 1, 1995 Fla. Sess. Law Serv. at 1394.
197. WEBSTER'S NEW WORLD DICTIONARY 759 (3d college ed. 1994).

identify its expressive intent? Or, is the phrase "domestic violence" merely a contradiction in terms?[198]

Collectively, domestic violence almost seems to suggest "good violence" or, at the very least, "better violence." Thus, the term is an oxymoron. The combination of the positive term "domestic" with the negative word "violence" lessens the negative connotation of the phrase. It is a euphemism since the phrase is now less distasteful and less offensive. Perhaps the term captures an American need to avoid domestic violence and treat hard topics euphemistically. For many years in our country, domestic violence was thought of as something within the family. In fact, it often went unreported by its victims. Even the police and the courts treated domestic violence differently than violence committed on strangers.

In order to do the victim justice and properly define the role of the perpetrator, the term "domestic violence" must be changed or eliminated. Domestic violence encompasses too many different types of violence. By giving domestic violence a label different from other forms of violence, it is thought of and treated differently than other types of violent crimes. The label "domestic violence" has diluted the seriousness of the crimes involved.

To strengthen the charge of "domestic violence" and accurately describe what it is, the legislature should return to the plain legal definition. The term "domestic violence" minimizes the impact of the brutality that often takes place within domestic relationships. Terms such as murder, aggravated battery, and aggravated assault clearly describe the action and impact the seriousness of the criminal misconduct and resulting harm. Moreover, domestic violence could be redefined as a battery, aggravated battery, or an attempted battery. These simple, though descriptive labels are

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198. *Webster's New World Dictionary* defines the word "domestic" as:

> 1. having to do with the home or housekeeping; of the house or family 2. of one's own country or the country referred to 3. made or produced in the home country; native 4. domesticated; tame: said of animals 5. enjoying and attentive to the home and family life.

Id. at 405. This word has almost a positive connotation. By contrast, the word "violence" means:

> 1. physical force used so as to injure, damage, or destroy; extreme roughness of action 2. intense, often devastatingly or explosively powerful force or energy, as of a hurricane or volcano 3.a) unjust or callous use of force or power, as in violating another's rights, sensibilities, etc. b) the harm done by this 4. great force or strength of feeling, conduct, or expression; vehemence; fury 5. a twisting or wrenching of a sense, phase, etc., so as to distort the original or true sense or form [to do *violence* to a text] 6. an instance of violence; violent act or deed.

Id. at 1490.

legal terms; terms that courts have spent hundreds of years defining. So why is the term "domestic violence" used instead of a standard legal term? It could be a result of our society's need to label actions and expressions before it attempts to discuss and understand them.

Webster's New World Dictionary does not include or define the term "domestic violence."[199] However, simply because there is no definition in the dictionary for domestic violence, does not mean that an analysis of the term is warranted. It is remarkable to see the other words that are included in the dictionary.[200] Domestic violence would be perceived differently if it were called battery, aggravated battery, or assault. *Black's Law Dictionary* defines battery as an "[i]ntentional and wrongful physical contact with a person without his or her consent that entails some injury or offensive touching."[201]

Black's further defines aggravated battery as "[a]n unlawful act of violent injury to the person of another, accompanied by circumstances of aggravation, such as the use of deadly weapon, great disparity between the ages and physical conditions of the parties, or the purposeful infliction of shame and disgrace."[202] Finally, *Black's* defines assault as:

> Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability so to do, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm . . . [a]n assault may be committed without actually touching, or striking, or doing bodily harm, to the person of another.[203]

These standard definitions would cover almost every possible scenario of domestic violence.

Changing the language used to describe domestic violence would impose stiffer sentences for the convicted abuser. The legislature could simply make any act of battery, aggravated battery, or assault against

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199. *Id.* at 405.

200. For example, on the very page where "domestic violence" should appear, the term "domestic relations court," appears defined as a "court with jurisdiction over cases involving relations within the family or household, as between husband and wife or parent and child." *Id.* Thus, in terms of the evolution of the phrase "domestic violence," it is inconceivable that a court of jurisdiction handling domestic violence matters was labeled as such prior to attaching the phrase "domestic violence" to the matters which it heard.

201. BLACK'S LAW DICTIONARY 152 (6th ed. 1990).

202. *Id.* at 153.

203. *Id.* at 114.

someone in the "domestic" sense an aggravating factor to be considered when sentencing. Linguistic changes might also accomplish the special goal the legislature has in more severely punishing a person guilty of such violence. The statute could still mandate the special reporting requirements of the police, the procedures used in administering domestic violence cases, and background checks. Furthermore, the presiding judge could still be required to consider any history the lawmakers feel is relevant in domestic violence cases.

If domestic violence must have a special label to be recognized, I suggest the following alternatives. Select a term that fits the seriousness and injurious nature of the act; a term that would correctly define the particular form of abuse. For example, an appropriate term might be "violence on a loved one" or "interrelationship violence." Because violence is committed on someone the perpetrator supposedly knows and loves, the language should express and communicate to people that the action is worse than a random act of violence. In these cases, the perpetrator has committed violence on someone who trusted him or her and someone who was more than likely living in their own home at the time. This way, society would be faced with the truth of what domestic violence really means.

By eliminating the term "domestic violence," society would be exposed to terminology that would better describe these serious and dangerous crimes. To some, domestic violence connotes conduct that is within the realm of the family and is, therefore, less serious than a "real" battery or assault. Crimes should be defined by the conduct and not by marital status or relationship. An aggravated battery or assault should be defined as such in order to communicate the seriousness of the conduct. A term which lessens the significance of the conduct or the societal response to that conduct should not be utilized.

V. RECOMMENDATIONS AND CONCLUSION

The main claim of this article is that although the legislature attained its goal in passing legislation which protects victims in domestic violence situations, it has failed to effectively communicate those aims to its many audiences. Furthermore, the term "domestic violence" is inadequate or deceptive, and lessens the significance of the crimes it purports to designate. Crimes should be defined by the conduct and not by marital status or relationship. The public awareness of the seriousness of incidents of domestic violence needs to be heightened.

Florida's domestic violence statute has undergone sweeping reform since 1992. The Florida Legislature set standards of education for members

of the judiciary who hear cases in the area of domestic violence. In addition, new laws mandate that judges be available twenty-four hours a day to hear cases and that victims be provided with knowledge of their rights, protection, and opportunities.

These new laws also effectively respond to the needs of victims and their minor children by awarding victims temporary exclusive custody of the children and temporary exclusive use of the marital dwelling. A perpetrator can be required to pay temporary support for the victim and children, as well as filing fees for injunctions. In some situations, the court can order the abuser to seek counseling. Law enforcement officers can arrest perpetrators on probable cause, without a warrant, regardless of whether the victim consents to the arrest. The police must also assist victims in receiving medical attention. The economic barriers that once prevented victims from seeking an injunction for protection against domestic violence no longer exist. Domestic violence is no longer a "behind closed doors" issue.

However, it is at the local level where society should attempt to put into practice the wishes of lawmakers in removing the pernicious blight of domestic violence from our society. In the past, domestic violence was thought of as something that was dealt with behind closed doors. Today, domestic violence has come to be recognized as a serious crime that often leads to physical and psychological injury or death. Assaulting one's spouse and maiming or killing one's child has serious consequences in today's society.

Many local enforcement agencies are forming "domestic violence" squads which "demonstrat[e] a newborn sensitivity to such problems in scattered areas."[204] Local communities and providers of services for victims now work with law enforcement agencies to make officers aware of the risks to victims in violent family situations. Generally, abusers are not likely to change their ways without intensive counseling. Programs for batterers have made some headway in effecting behavioral change, but success is relatively limited. In addition, restraining orders have only had minor success in separating the batterers from the battered. Similar to maxim that paper cannot stop a bullet, restraining orders, alone, cannot stop the violence.

The pro-arrest policy of Florida should help alleviate the problem with prior arrest policies. Law enforcement officers understand that abused

204. Sandy Rovner, *Violence Hits Home: When the Abused Child Grows Up*, WASH. POST, Aug. 11, 1987, at Z12.

persons have a cyclical tendency to return to their abuser. Accordingly, lawmakers hope that the pro-arrest policy will be the single, most effective, weapon against domestic violence by stopping spouses and children from continuing to form relationships with abuser type personalities.

It is encouraging to note that reportings of abuse are rising. This does not implicate a rise in the actual incidents of domestic violence. It indicates that an increase in public awareness of the problem has helped bring domestic violence out into the open. Perhaps we can measure our success in reducing violence by counting the increased safety of our men, women, and children.

Society benefits when domestic violence is diminished. Death, injury, and the destruction of relationships all lead to an unhealthy society. Acts of domestic violence need to be taken seriously to avoid degradation of society. The need to address such harm has been recognized by the Florida Legislature in its recent alterations in the language of Florida's domestic violence statutes. Better training, increased sensitivity, taking a pro-arrest and pro-prosecutorial positions, all indicate the legislature's desire take domestic violence seriously.

These new laws place increased importance on domestic violence. Although the statutory language is clear and effective, a large percentage of the population is unaware of the legislative changes. Therefore, the justice system must educate the public about their increased rights under the new laws. In accomplishing this goal, the justice system should enlist the media to help educate the public. Only then will society become aware of its rights and remedies and confidently trust our system of justice to properly handle acts of domestic violence.

Evidence: 1995 Survey of Florida Law

Dale Alan Bruschi*

TABLE OF CONTENTS

I. INTRODUCTION

Cases for this year's Survey of Florida Evidence demonstrate some of the same similarities as in previous years. Criminal evidentiary cases outnumbered civil evidentiary cases, and relevancy and hearsay issues were the most prolific topics. During the survey period, the Supreme Court of

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Florida resolved some outstanding conflicts between the district courts of appeal on issues regarding expert testimony and hearsay; however, with the exception of these cases there were only a few noteworthy cases. The legislature added in a new evidentiary privilege and a new hearsay exception this year and made the language of the evidence code gender-neutral.

II. RULINGS ON EVIDENCE

Section 90.104[1] of the *Florida Evidence Code* requires a timely objection in order to preserve a point for appeal.[2] Objections which are not timely made are waived.[3] The appellate courts are unable to consider an assertion of error in the admission of evidence, made in the trial court, if counsel fails to make a contemporaneous objection at trial.[4] Only if the error is *fundamental* will an appellate court consider the issue on appeal.[5] The Supreme Court of Florida has indicated that fundamental error will be found *infrequently*.[6] However, as the following case indicates, the appellate courts of Florida occasionally turn this simple rule on its head in a pell-mell effort to correct what they perceive to be an injustice from the reading of a cold record.

In a case that arose from a certified question regarding the child hearsay exception of section 90.803(23)[7] of the *Florida Statutes*, the Supreme Court of Florida followed the old adage that "'hard cases make bad law.'"[8] In *Anderson v. State*,[9] the defendant was charged with lewd and lascivious assault upon a child.[10] Prior to trial the State gave notice that it intended to introduce testimony at trial that the child victim told two

1. FLA. STAT. § 90.104 (Supp. 1994).

2. *See* Holley v. State, 523 So. 2d 688 (Fla. 1st Dist. Ct. App. 1988).

3. *See* Roundtree v. State, 350 So. 2d 32 (Fla. 2d Dist. Ct. App. 1977), *cert. denied*, 362 So. 2d 1347 (Fla. 1978).

4. A proper objection has two ingredients, both of which are needed to preserve objections for appellate review. First, the objection must be *timely*. If counsel does not promptly object the problem is waived. Second, the objection must be *specific*. *See, e.g.*, Glendening v. State, 536 So. 2d 212 (Fla. 1988), *cert. denied*, 492 U.S. 407 (1989). Failure to state the correct grounds for objection will waive it. The appellate courts have strictly monitored this rule.

5. FLA. STAT. § 90.104(3) (Supp. 1994).

6. Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970) (citations omitted) ("The appellate court should exercise its discretion under the doctrine of fundamental error very guardedly."); *see also* CHARLES W. EHRHARDT, FLORIDA EVIDENCE, § 104.6 (5th ed. 1994).

7. FLA. STAT. § 90.803(23) (1991).

8. Anderson v. State, 655 So. 2d 1118, 1119 (Fla. 1995).

9. *Id.* at 1118.

10. *Id.* at 1119.

adults that the defendant touched her with his penis.[11] There was no other corroborating eyewitness or physical evidence tying the defendant to the crime. The State contended that the testimony fell within the exception to the hearsay rule for statements made by child victims set forth in section 90.803(23).[12]

At trial the hearsay was entered and there was no objection by the defendant, nor was there a hearing held as was contemplated by section 90.803(23).[13] Additionally, the trial court ruled that the child was not competent to testify as the child could not give consistent answers regarding whether she knew what it meant to tell the truth.[14] The defendant's motion for judgment of acquittal was denied and the jury returned a guilty verdict.[15]

On appeal to the district court the defendant argued that his conviction was based solely upon hearsay that was never determined to be reliable nor corroborated.[16] The district court affirmed the conviction finding that there was no objection at trial to the testimony.[17] The Supreme Court of Florida reversed the district court of appeal, despite finding that: 1) where there are no objections made to hearsay the evidence is admitted and the issue is barred from appellate review;[18] 2) the trial court's failure to make sufficient findings under section 90.803(23) of the *Florida Statutes* is not fundamental error;[19] 3) and finally, and most disturbing, had an objection been made, the Supreme Court of Florida indicated that the statement might have been

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11. *Id.*

12. *Anderson*, 655 So. 2d at 1119.

13. *Id.* The competency of the defending trial attorney must surely be questioned given the facts of the case. The evidence code specifically requires a hearing before the hearsay statement can be utilized in court. FLA. STAT. § 90.803(23)(a)(1) (1991). To ask what type of trial strategy was being used when crucial damning testimony is let in without the required hearing *or even an objection* boggles the imagination. However, poor lawyering is fostered when the appellate courts bail out an incompetent attorney, instead of having the conviction collaterally attacked for ineffective assistance of counsel under Rule 3.850. *See* FLA. R. CRIM. P. 3.850. Based on the facts reported in the opinion the issues were not preserved for appeal and should not have been reversed by the Supreme Court. The proper procedure was a collateral attack of the conviction for ineffective assistance of trial counsel.

14. *Anderson*, 655 So. 2d at 1119.

15. *Id.*

16. *Id.*

17. *Id.*

18. *See* Wyatt v. State, 641 So. 2d 1336 (Fla. 1994), *cert. denied*, 115 S. Ct. 1983 (1995).

19. *See* State v. Townsend, 635 So. 2d 949 (Fla. 1994).

admissible as an excited utterance.[20] The supreme court spent much of the opinion stating that their holding "should be specifically limited to the facts of this case."[21] As well it should, since section 90.104 of the *Florida Statutes* requires a specific and timely objection.[22] It seems that the supreme court is already forgetting their prior rulings, in a host of other cases, that have come down hard on predicating a reversal when a contemporaneous objection is lacking and the error is not fundamental.[23] The only guidance this case offers is the extent that the appellate courts will sometimes go to prevent a perceived injustice.

The better procedure would have been to uphold the conviction, since the issue was not preserved. The conviction could then be collaterally attacked under Rule 3.850[24] for ineffective assistance of counsel. Only in this way will the courts of Florida foster proper lawyering while preserving the rights of the accused. Throwing in a "hard case makes bad law" decision, that is directly contrary to dozens of other decisions, offers neither guidance nor enlightenment for those attorneys who diligently read the appellate opinions for direction to competently try their cases and uphold the rights of their clients.

III. INTRODUCTION OF RELATED WRITINGS OR RECORDED STATEMENTS

Section 90.108[25] of the *Florida Evidence Code* allows a party to contemporaneously introduce a writing or recorded statement after a similar writing or recorded statement has been introduced by the opposing party. When a writing or recorded statement is introduced at trial, a misleading impression may be created by taking the matters contained in it out of context. Therefore, section 90.108 allows the adverse party to require the

20. An excited utterance under § 90.803 of the *Florida Statutes* is a firmly rooted hearsay exception, whose reliability and trustworthiness is grounded in the fact that "[a] person who is excited as a result of a startling event does not have the reflective capacity which is essential for conscious misrepresentation; therefore statements that are made by the person who is in a state of excitement are spontaneous and have sufficient guarantees of truthfulness." EHRHARDT, *supra* note 6, § 803.2.

21. *Anderson*, 655 So. 2d at 1119.

22. *See* Dale A. Bruschi, *Evidence: 1992 Survey of Florida Law*, 17 NOVA L. REV. 255, 257 (1992).

23. *See* Rodriguez v. State, 609 So. 2d 493 (Fla. 1992); Glendening v. State, 536 So. 2d 212 (Fla. 1988); Clark v. State, 363 So. 2d 331 (Fla. 1978); Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970); Atlantic Coast Line R. Co. v. Shouse, 91 So. 90 (Fla. 1922).

24. FLA. R. CRIM. P. 3.850.

25. FLA. STAT. § 90.108 (1993).

remainder of the writing or document to be introduced if fairness requires that it be considered contemporaneously with the original writing or document. This principle is often called the "rule of completeness."

Section 90.108 has been greatly expanded by the decisional case law over the years.[26] The strict interpretation of section 90.108 only allows introduction of the related writing or document at the time the original writings or documents are offered into evidence. The provision may not be utilized during cross-examination or during the party's own case.[27] However, the decisional case law has expanded this section by allowing not only written statements, documents, and "recorded statements"[28] but it also has been applied to testimony regarding part of a conversation.[29] Additionally, some decisions have applied section 90.108 to questions asked during cross-examination, rather than requiring that the additional evidence be admitted at the time the witness testifies on direct examination.[30]

A good example of the expansion of section 90.108 is seen in *Johnson v. State*.[31] In *Johnson*, the defendant was convicted of manslaughter. When the defendant was arrested he told the police officer that he had been in a fight with the victim over a broken watch and that he hit the victim with a stick.[32] Later at the police station the defendant gave a formal statement

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26. *See* Long v. State, 610 So. 2d 1276 (Fla. 1992); Morrison v. State, 546 So. 2d 102 (Fla. 4th Dist. Ct. App. 1989).

27. In other words, opposing counsel cannot wait until his cross-examination of the witness or until his case-in-chief to enter the related writings or documents under this section. In civil trials the use of § 90.108 is often confused with the use of Rule 1.330(a)(4) and 1.340(b) of the *Florida Rules of Civil Procedure*. These rules state that when portions of depositions and interrogatories are not offered by a party, an adverse party may require the introduction of any other part that in fairness ought to be considered with the part introduced. Section 90.108 extends the right beyond depositions and interrogatories to *any writing or recorded statement* offered as evidence during the course of a trial.

There is another difference between § 90.108 and rule 1.330(a)(4). Rule 1.330(a)(4) provides that any other party may introduce any other parts of the deposition. Unlike § 90.108, rule 1.330(a)(4) does not require that the portion of the deposition explain or clarify the portions originally offered.

28. A statement which is recorded by a court reporter or by a tape-recording is a "recorded statement" and is subject to § 90.108.

29. *See* Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

30. *See* Johnson v. State, 653 So. 2d 1074 (Fla. 3d Dist. Ct. App. 1995); Somerville v. State, 584 So. 2d 200 (Fla. 1st Dist. Ct. App. 1991).

31. 653 So. 3d at 1074.

32. *Id.* at 1075.

asserting that he hit the victim only after the victim threatened him and only after the victim hit him first.[33]

During trial the State introduced the defendant's first statement. The trial court refused to allow the defense to cross examine the officer concerning the second statement.[34] The defendant was convicted at trial and the Third District Court of Appeal reversed the conviction. The district court cited section 90.108 as a basis for its finding that the State opened the door by eliciting testimony as to part of the conversation.[35] Therefore, the defendant was entitled to cross-examine the witness about other relevant statements made during the conversation.

The district court reasoned that the "rule is not limited to segments of one conversation, but also allows admission of 'other related conversations that in fairness are necessary for the jury to accurately perceive the whole context of what has transpired between the two.'"[36] The defendant should have been allowed to cross-examine the officer regarding the second statement, since the second statement qualified or explained the first statement. By itself the first statement standing alone left the jury with an allegedly incomplete picture of the defendant's behavior.

IV. IMPEACHMENT

In *Peterson v. State*,[37] the Fourth District Court of Appeal held that a witness may be asked about prior convictions if the attorney has a good faith basis for asking the questions even though the certified copies of conviction are not in hand. Though this area of the evidence code would seem to be well-settled in Florida, it is actually far from that.

In *Peterson*, the defendant testified at trial regarding his claim that he acted in self defense when he stabbed the victim.[38] By taking the stand the defendant placed his credibility in issue and was thus open to impeachment regarding his prior convictions. After the State closed its case, the defendant moved *in limine* to exclude any questioning regarding the defendant's prior convictions when the defendant testified. Defense counsel acknowledged that the prosecution had supplied him with copies of reports

33. *Id.*

34. *Id.* Generally, the defendant's self-serving exculpatory statement is inadmissible. It is hearsay that does not fall within an exception.

35. *Id.*

36. *Johnson*, 653 So. 2d at 1075 (citations omitted).

37. 645 So. 2d 10 (Fla. 4th Dist. Ct. App. 1994), *review denied*, 659 So. 2d 272 (Fla. 1995).

38. *Id.* at 11.

from the State of New York regarding the defendant's criminal record. In addition, the prosecution had supplied the defense with an N.C.I.C.[39] printout of the defendant's convictions. The defense contended that the prosecution could not inquire into the defendant's criminal record since these "rap sheets" were not certified copies of conviction.[40]

During a hearing regarding the use of the impeachment material, the trial court reviewed the rap sheets with counsel. The prosecutor stated that he had a good faith belief that the defendant had at least three felony convictions. The trial court agreed to allow the prosecutor to ask the standard two questions: 1) Have you ever been convicted of a felony?; and 2) How many times?[41] The defense on redirect examination asked the defendant how long ago the convictions were. The defendant stated they were twenty years ago.[42] The district court found that the procedures utilized by the trial court were sufficient to allow the impeachment without having the certified copies of conviction in hand.[43]

On appeal, the defendant cited *Cummings v. State*,[44] for the "rule" prohibiting questions regarding prior convictions unless the prosecutor has certified copies of conviction in hand to introduce as impeachment. The district court noted that this was neither the *Cummings* court's "holding in the case nor an absolute proscription requiring reversal in every case where the suggested procedure is not followed."[45] The district court correctly posited that *Cummings* only addressed the proper form of the questions to be asked on impeachment under the newly enacted *Florida Evidence Code*.[46] The *Cummings* court did not develop a blanket rule of law that certified copies of conviction must be in hand to allow impeachment.

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39. This is an acronym for "National Crime Index Computer" printout. The printout is for law enforcement eyes only and it is improper to give this type of printout to anyone outside of law enforcement.

40. *Peterson*, 645 So. 2d at 11. The defense did not challenge the accuracy of the "rap sheets" since the defense did not think that the State could inquire into his client's criminal records without certified copies of conviction.

41. *Id.* During the actual cross examination the prosecutor asked the standard questions but when the defendant stated that he had one less felony than the rap sheets indicated the prosecutor followed up his questioning by asking if the defendant had "ever been convicted of a misdemeanor involving dishonesty" to which the defendant answered "yes." This was the proper question to ask under the *Florida Evidence Code*. *See* EHRHARDT, *supra* note 6, § 610.6.

42. *Peterson*, 645 So. 2d at 11.

43. *Id.* at 11-12.

44. 412 So. 2d 436 (Fla. 4th Dist. Ct. App. 1982).

45. *Peterson*, 645 So. 2d at 12.

46. *Id.*

The district court realized that had the defendant in *Peterson* denied his prior convictions, the only way the prosecution could impeach him was by entering certified copies of his prior convictions in their rebuttal case. The "rap sheets" would not have been admissible for such a purpose and further questioning on the subject would not be allowed.[47] Without the certified copies of conviction the prosecution would have been stuck with the defendant's denial of his prior convictions.[48]

Florida evidence writers have generally acknowledged that before the prosecution can ask about prior convictions, the prosecution must have certified copies of conviction in hand. No per se "good faith" exception has technically existed. The reasoning is simple: if the prosecution asks the defendant if he's ever been convicted of a felony, and the defendant denies the question,[49] the jury could be left with the indelible impression that the defendant has prior criminal convictions. This could mislead the jury if the defendant was, in fact, charged but never convicted or was merely arrested but never convicted. Without the ability to prove up the prior convictions, the state has the immutable advantage of misleading the jury regarding the defendant's prior criminal record. Therefore, "good faith" has never technically existed.[50]

However, in the situation that existed in *Peterson* the trial court had a very strong argument for allowing the impeachment questions to be asked. Both of the State's "rap sheets" indicated convictions and defense counsel's argument to the trial court indicated that his client had been previously convicted of felonies.[51] Since a trial is a search for the truth, the defendant has no constitutional right to lie under oath.[52] The defense attorney's

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47. *See* Irvin v. State, 324 So. 2d 684 (Fla. 4th Dist. Ct. App.), *cert. denied*, 334 So. 2d 608 (Fla. 1976).

48. Of course the defendant's statement denying his prior convictions could later be used against the defendant in a perjury charge if the defendant, in fact, lied under oath during trial.

49. Or, likewise if the defendant denies the number of convictions.

50. But see Alvarez v. State, 467 So. 2d 455 (Fla. 3d Dist. Ct. App.), *review denied*, 476 So. 2d 675 (Fla. 1985), where the Third District Court of Appeal attempted to establish a "good faith" exception.

51. *Peterson*, 645 So. 2d at 11. Defense counsel stated that at least one of the defendant's three prior felony convictions was not true and the defendant would deny that one. *Id.* This indicated that the defendant did, in fact, have two valid felony convictions that he would not deny. *Id.*

52. When the prosecution does not have certified copies of conviction, but has some indication that the defendant/witness may have prior convictions, the proper procedure should be for the defendant to be questioned under oath, outside the presence of the jury. Since the defendant/witness does not have a constitutional right to lie under oath, the prosecution has some indication of prior felony convictions (or misdemeanors involving dishonesty or false

argument to the court impliedly acknowledged that the defendant had prior convictions, and the prosecution had a strong good faith belief of the defendant's prior convictions through two "rap sheets." Therefore the impeachment was properly allowed.[53] The Fourth District Court of Appeal's withdrawal from an inflexible rule of impeachment to a more flexible rule will not violate a defendant's constitutional right to a fair trial and will insure that a trial will still be a search for the truth.[54]

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statement) because a trial is a search for the truth and the credibility of the defendant/witness is often a crucial point of the trial, this procedure should be utilized.

If the defendant/witness admits the prior convictions outside of the presence of the jury, then the questions should be allowed to be asked in the presence of the jury. If the defendant/witness then denies the prior convictions in front of the jury, the prosecution can prove up the prior statements by calling the court reporter to testify to the defendant/witness' prior statements regarding his prior convictions. The defendant/witness could also be charged with perjury. *See Alvarez*, 467 So. 2d at 455. *Alvarez* was later disapproved by the Supreme Court of Florida in Riechmann v. State, 581 So. 2d 133 (Fla. 1991), *cert. denied*, 113 S. Ct. 405 (1992), but only to the extent that it allowed the trial court to determine that a conviction was punishable by death or imprisonment in excess of one year under the law of this country and not the country were the conviction occurred. The proper procedure is to establish that the law was punishable by death or imprisonment in excess of one year under the law of the foreign country where the defendant was convicted, before it can be used for impeachment.

53. *Peterson*, 545 So. 2d at 13. The Fourth District Court of Appeal noted a conflict with Peoples v. State, 576 So. 2d 783 (Fla. 5th Dist. Ct. App. 1991), *aff'd on other grounds*, 612 So. 2d 55 (Fla. 1992). The *Peoples* case followed *Cummings* in excluding impeachment evidence when the certified copies of conviction are not in hand. But as noted, *supra* note 45, the Fourth District Court of Appeal recognized that *Cummings* did not reach such a holding. Therefore, the Fifth District Court of Appeal's reliance on *Cummings* for this proposition is inaccurate.

54. The procedure outlined in note 51, *supra*, is the proper and correct way to proceed when there are no certified copies of conviction in hand, but there is a "good faith" belief that the defendant/witness has convictions. The "good faith" belief will foster judicial economy, since precious judicial resources will not be spent sending the jury out if there is no basis for the prosecution to even ask the question. This procedure will guard against the prosecution asking about criminal convictions when it cannot prove them up, and therefore, leave an improper impression on the jury. If the prosecution gets a denial to the questions and does not have certified copies of conviction, it will not be allowed to repeat the questions before the jury.

This procedure will safeguard the integrity of the trial court as a search for the truth, since an acknowledgment of the prior convictions should be allowed to be repeated in the presence of the jury even though certified copies of conviction are not in hand. The jury will then be able to properly evaluate the defendant/witness' testimony. However, an improper denial by the defendant/witness will not allow the individual to subvert the system to his own end, since such a denial could subject him to a prosecution for perjury even if the individual is successful in the original trial. No individual has the constitutional right to subvert justice and the search for the truth by being fortunate enough to have his convictions in a distant

V. EXPERT OPINION TESTIMONY

A. *Scientific Evidence*

During the survey period the Supreme Court of Florida delved into the area of expert testimony on scientific evidence under section 90.702 of the *Florida Evidence Code*.[55] *Ramirez v. State*[56] is of value because the supreme court discusses the procedure to use when utilizing novel scientific principles under the *Frye* standard.[57] In *Ramirez*, testimony revealed that the murder victim was stabbed twelve times. The State introduced into evidence a knife linked to the defendant. During trial the expert gave an opinion that the defendant's knife was the only knife that could have been used in the murder.[58]

Prior to trial, the State requested a special hearing to present testimony and evidence to the trial judge relating to the reliability of knifemark comparison evidence.[59] The hearing was held and the State presented evidence regarding the theory, practice, and procedures involved in knifemark comparisons.[60] After the State's presentation at the pretrial hearing, the defense offered an expert to testify, against the scientific reliability of knife mark comparisons.[61] The trial judge refused to allow the defense expert to testify, stating that such testimony was for the jury and not relevant to the issue of basic admissibility.[62]

The supreme court analyzed the factors needed when expert testimony concerns a new or novel principle:

> The admission into evidence of expert opinion testimony concerning a new or novel scientific principle is a four-step process. First, the trial

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jurisdiction that has a poor or slow record keeping system.

55. FLA. STAT. § 90.702 (Supp. 1994).

56. 651 So. 2d 1164 (Fla. 1995).

57. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

58. *Ramirez*, 651 So. 2d at 1166. The State could have avoided this second appeal and reversal, by simply following the supreme court's advice in the first appeal and reversal to present testimony that the wounds on the victim were consistent with the defendant's knife. *Id.* However, the State decided that it would be wiser to prove that this was the *only* knife that could have been used in the murder. They will now, of course, get to try this case for a third time.

59. *Id.* This was done in response to the supreme court's request after this case was reversed in the first trial. *See* Ramirez v. State, 542 So. 2d 352 (Fla. 1989), *appeal after remand*, 651 So. 2d 1164 (Fla. 1995).

60. *Ramirez*, 651 So. 2d at 1166.

61. *Id.*

62. *Id.*

> judge must determine whether such expert's testimony will assist the jury in understanding the evidence or in determining a fact in issue. Second, the trial judge must decide whether the experts testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs." This standard, commonly referred to as the "*Frye* test," was expressly adopted by this court in *Bundy v. State*, 471 So. 2d 9, 18 (Fla. 1985), *cert. denied*, 479 U.S. 894 (1986) and *Stokes v. State*, 548 So. 2d 188, 195 (Fla. 1989). The third step in the process is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. § 90.702, Fla. Stat. (1993). All three of these initial steps are decisions to be made by the trial judge alone. Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.[63]

The supreme court found the second inquiry to be especially important to the process.[64] Basically, when a novel type of scientific opinion is offered, the party offering the evidence must demonstrate the requirements of scientific acceptance and reliability in the particular field in which it belongs.[65] The burden is on the proponent of the evidence to prove the general acceptance of the underlying scientific principle, and the testing procedures used to apply that principle to the facts of the case. The trial judge will determine this question. The issue of general acceptance under the *Frye* test is established by a preponderance of the evidence.

A hearing on the admissibility of novel scientific evidence is adversarial. Both sides may present conflicting evidence to the trial judge as the trier of fact. The testimony of *both* parties is needed, otherwise the trial judge is denied a full presentation of the relevant evidence. The supreme court found that it was impossible to determine whether the evidence presented by the State was sufficient to prove the reliability of knifemark comparisons because the defendant was denied the right to present any evidence to the contrary at the pretrial hearing.[66] Therefore, the case was reversed and remanded.[67]

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63. *Id.* at 1166-67 (citations omitted).

64. *Id.* at 1167.

65. *See,* EHRHARDT, *supra* note 6, § 702 at 500; MICHAEL H. GRAHAM, HANDBOOK OF FLORIDA EVIDENCE § 702, at 517 (ed. 1987).

66. *Ramirez*, 651 So. 2d at 1168.

67. *Id.*

In a somewhat related case the Second District Court of Appeal dealt with the *Frye* standard from the standpoint of DNA statistical analysis. In *Brim v. State*,[68] the issue presented to the district court was whether,

> in considering a request for admission of the statistical consequences of the analysis of matching DNA samples, a court must exclude all or part of that analysis if the court is presented with evidence of two differing but generally accepted views within the scientific community concerning the proper population frequency statistics to be applied.[69]

The statistical analysis is critical to DNA testing for the extremely persuasive probability estimates (one in a billion) that are associated with the testing.

In analyzing the statistical probabilities in *Brim*, two divergent views emerged. First, the statistical probabilities would change depending on which sample populations database was utilized.[70] This essentially means that use of one database would demonstrate that one in one billion had the same genetic DNA code as the defendant, while utilization of another population database would yield a figure of one in nine thousand.[71]

In *Brim*, both statistical theories were presented. It was argued that both theories are generally accepted in the scientific community.[72] The concern is whether a disagreement regarding the deductions of a scientific theory makes the theory itself inadmissible in evidence. The *Brim* court, citing to the *Ramirez* decision, found that where there are two differing, but two generally accepted deductions that can be made from generally accepted scientific evidence, they may *both* be admitted, provided that the underlying scientific evidence satisfies *Frye*.[73]

The district court, finding an anomaly in the *Ramirez* decision, stated

> [w]e conclude that the issue before us, the admissibility of expert testimony using comparison statistics to provide evidence regarding the relevant force of a generally accepted scientific procedure, is encom-

68. 654 So. 2d 184 (Fla. 2d Dist. Ct. App. 1995).

69. *Id.* at 184.

70. *Id.* at 185. These sample populations were taken from the field of human population genetics. The statistical significance is measured by the frequency with which a particular DNA pattern would be observed in a sample population.

71. *Id.*

72. *Id.*

73. *Brim*, 654 So. 2d at 188.

> passed in steps three and four of the analysis in *Ramirez* and does not require application of the Frye test to those steps.[74]

In other words, the deductions can be admitted as long as the scientific theory satisfies *Frye*. However, language in the *Ramirez* decision indicates that deductions drawn from an accepted scientific theory *must also* satisfy *Frye*.[75] The *Brim* decision conflicts with *Vargas v. State*,[76] in finding that DNA population statistics do not need to meet the stringent *Frye* test.[77] The district court certified conflict between the two cases.[78]

B. *Testimony by Experts*

The Supreme Court of Florida settled a conflict among the district courts regarding the use of expert testimony in the case of *Angrand v. Key*.[79] *Angrand* arose out of a wrongful death suit. During the course of the trial, the plaintiff introduced expert testimony on the issue of grief and bereavement.[80] The trial judge was reluctant to admit the testimony, since the expert did not testify to anything that was outside the common experience of the jury.[81] However, the trial judge admitted the evidence based on *Holiday Inns, Inc. v. Shelburne*.[82]

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74. *Id.*

75. *Ramirez*, 651 So. 2d at 1168.

76. 640 So. 2d 1139 (Fla. 1st Dist. Ct. App. 1994), *review granted*, 659 So. 2d 273 (Fla. 1995). The district court in *Vargas* found that the method used to arrive at probabilities was not generally accepted in the relevant scientific community.

77. *Brim*, 654 So. 2d at 187.

78. *Id.*

79. 657 So. 2d 1146 (Fla. 1995).

80. *Id.* at 1147.

81. *Id.*

82. 576 So. 2d 322 (Fla. 4th Dist. Ct. App.), *review dismissed*, 589 So. 2d 291 (Fla. 1991). *Shelburne* allowed the testimony of an expert on grief and bereavement. Doctor Platt, who testified in *Angrand*, was also the expert witness in *Shelburne*. In *Shelburne*, Dr. Platt testified about grief and bereavement and how the plaintiffs, whose son had been killed, worked their way through the grief process. The testimony included where the plaintiffs were in the grief process at the time of trial, what factors had affected their response to their son's death, and what grief they would experience in the future. The Fourth District Court of Appeal upheld the trial courts ruling that the testimony was not outweighed by any prejudicial effect, and that this testimony assisted the jurors in understanding an area that was not within a person's normal everyday comprehension.

The Third District Court of Appeal reversed, finding that the expert did not testify to anything that was outside the common experience of the jury.[83] The district court felt that most of the jurors had experienced the death or loss of a loved one.[84] Additionally, the district court found that close family relationships and the loss of loved ones could be demonstrated adequately with lay witness testimony.[85] The district court concluded that expert testimony on grief and bereavement was unduly prejudicial, since a jury might give this testimony undue weight because it came from an expert witness.[86] In *Angrand*, the Third District Court of Appeal noted direct conflict with the *Shelburne* case.[87]

The Supreme Court of Florida resolved the conflict between *Angrand* and *Shelburne* by narrowing the *Shelburne* decision. The supreme court found that a trial court is afforded broad discretion in determining the subject matter on which an expert may testify.[88] The *Shelburne* decision, however, limited the trial court's discretion by making a general determination that the subject matter of that case, grief and bereavement, is not within the juror's everyday understanding.[89] The supreme court found that the trial judge's discretion should not be so limited.[90]

The trial court should exercise its discretion so that only expert testimony which will assist the trier of fact will be admitted. Expert testimony cannot be admitted to put otherwise inadmissible evidence before the jury, to relay matters that are within the jurors common understanding, or to summarize lay witness testimony.[91] The supreme court concluded that the trial judge in *Angrand* should have been able to exercise his discretion to exclude Dr. Platt's testimony on grief, since it was not outside the jury's common understanding. Binding the trial judge's discretion in this area was error.[92] Because *Shelburne* foreclosed the exercise of the trial court's discretion regarding the admission of expert testimony, the supreme court properly limited its scope.[93]

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83. Key v. Angrand, 630 So. 2d 646 (Fla. 3d Dist. Ct. App.), *review granted*, 645 So. 2d 450 (Fla. 1994), *rev'd*, 657 So. 2d 1146 (Fla. 1995).

84. *Id.* at 650.

85. *Id.*

86. *Id.*

87. *Id.*

88. Town of Palm Beach v. Palm Beach County, 460 So. 2d 879 (Fla. 1984).

89. *Shelbourne*, 576 So. 2d at 335-37.

90. *Town of Palm Beach*, 460 So. 2d at 885.

91. *Angrand*, 657 So. 2d at 1148.

92. *Id.*

93. *Id.*

In a wrongful death action, the statute does not designate "grief" as a recoverable damage.[94] However, the statute does allow for loss of companionship and for mental pain and suffering.[95] The relevant testimony on these subjects comes from lay witnesses who are generally friends and survivors. These individuals testify as fact witnesses, not as experts. Since there is no objective standard to measure this kind of damage, precise calculations are hard to make. The jury is generally guided by its common understanding and everyday life experiences in determining this type of damage. Therefore, *expert testimony* in an area generally guided by *common life experiences* may lead to an unfair assessment of damages. The supreme court recognized this pitfall and reversed the *Angrand* case on the issue of damages.[96] However, the supreme court felt that the expert testimony was not so prejudicial as to require a reversal on the issue of liability.[97]

VI. HEARSAY

A. *The Postell Rule*

In *Trotman v. State*,[98] the district court reversed the case for violation of the *Postell* Rule.[99] The defendant in *Trotman* was convicted for armed robbery and armed burglary. At trial, the investigating officer testified that after speaking to an unidentified, nontestifying juvenile, the officer went to the location of the victim's stolen car and arrested the defendant.[100] The district court realized that the only inference a jury could draw from this testimony was that the juvenile told the officer that the defendant committed

94. FLA. STAT. § 768.21 (1993 & Supp. 1994).

95. FLA. STAT. § 768.21(2) (1993).

96. *Angrand*, 657 So. 2d at 1151.

97. *Id.* This makes perfect sense, since expert testimony on grief would probably not be an integral part of the liability aspect of the case. However, this holding should be confined to the facts of this case, since improperly admitted expert testimony, even on damages issues, could be so prejudicial as to warrant a new trial on the issue of liability.

98. 652 So. 2d 506 (Fla. 3d Dist. Ct. App. 1995).

99. *Id.* at 507. The *Postell* rule is in reality a violation of § 90.801(2) of the *Florida Statutes*. It allows what is essentially hearsay evidence to come before the jury without falling within a proper hearsay exception. Postell v. State, 398 So. 2d 851 (Fla. 3d Dist. Ct. App.), *review denied*, 411 So. 2d 384 (Fla. 1981). It occurs when testimony leads a jury to believe that a non-testifying witness has given the police, or other witness, evidence of an accused's guilt, even though the testimony of the non-testifying witness is hearsay and there is no hearsay exception for it. *Id.*

100. *Trotman*, 652 So. 2d at 507.

the crime.[101] Since the juvenile was not subject to cross-examination as required under section 90.801(2)(c), the statement of identification of the defendant was improper.[102] Additionally, the statement did not fall under another hearsay exception.

This situation almost inevitably arises when the prosecution has a gap in their evidence. This gap is due, in part, to three possibilities: First, the nontestifying witness may have simply disappeared; second, the nontestifying witness may not have been identified by the investigating officer in his police report, rendering the witness unknown; or third, the attorney may have simply forgotten to subpoena the witness. In any case, the prosecuting attorney must now try to fill the gap between the crime and the defendant's arrest. This is done in an attempt to strengthen his or her case, and lay it out in a logical manner. However, to avoid the hearsay objection that occurs when the officer is questioned regarding what the nontestifying witness told him, the prosecuting attorney usually resorts to asking the officer what he did *after* he spoke with the witness.[103] The logical inference to be drawn from this is that the witness told the officer that the defendant committed the crime.

Hearsay does not have to be verbal in order to be hearsay. When a statement, belief, or assertion can be implied from the *conduct* or statement of a person, the implied assertion is within the definition of hearsay.[104] Though the case does not add any new case law to this field, it is a good reminder for attorneys that hearsay can take non-verbal as well as verbal forms.

B. *The Child Hearsay Exception*

Section 90.803(23) of the *Florida Statutes* creates a limited exception to the hearsay rule for statements by children eleven years of age or younger. The statement must describe an act of sexual abuse in the presence of, with, by, or on the declarant child.[105] During the survey

101. *Id.*

102. FLA. STAT. § 90.801(2)(c).

103. The prosecutor generally tells the officer not to repeat any statements of the nontestifying witness. He is instructed to tell just what he did after he spoke with this witness. The argument to the trial court is that since no statements were given, there can be no hearsay violation.

104. *See* MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801.7 (3d ed. 1991); EHRHARDT, *supra* note 6, § 801.2 at 552.

105. FLA. STAT. § 90.803(23) (Supp. 1994).

period, the Supreme Court of Florida settled a conflict between the district courts of appeal regarding this statutory provision.

In *State v. Dupree*,[106] the defendant was tried for the first-degree murder of two-year-old Jirisha Thompson. Before the trial, the State gave the requisite ten days notice pursuant to its intention to rely on section 90.803(23) for statements made by the six-year-old brother concerning the crime. The defense objected on the grounds that the hearsay exception did not apply to a declarant who was not the victim of the crime in question.[107]

At trial, the six-year-old testified regarding what he had seen on the night of the victim's death. Several adult witnesses testified to what the six-year-old told the Department of Health and Rehabilitative Services (HRS) investigator during an interview regarding the events leading up to the victim's death.[108] The witnesses observed this interview through a two-way mirror with the help of an audio system. The defense objected to the use of these hearsay statements made to the HRS investigator.[109]

The defendant in *Dupree* was convicted at trial. On appeal, the First District Court of Appeal reversed the conviction. The district court held that the hearsay exception was not applicable to the child's statements because the child was not the victim of the charged offense.[110]

In *Russel v. State*,[111] the Fifth District Court of Appeal came to the opposite conclusion, holding that "[s]tatements made by a child who witnessed sexual battery and aggravated child abuse and who otherwise meets the statutory criteria *are not* excepted from admissibility merely because this child was not the object of the attack."[112] The Fifth District reasoned that "[a] victim is a victim regardless of any charging document."[113]

The Supreme Court of Florida affirmed the *Dupree* case and disapproved of the decision of the *Russell* court.[114] The Supreme Court of

106. 639 So. 2d 125 (Fla. 1st Dist. Ct. App.), *review granted*, 648 So. 2d 724 (Fla. 1994), *aff'd*, 656 So. 2d 430 (Fla. 1995).

107. *Dupree*, 656 So. 2d at 431.

108. *Id.*

109. *Id.*

110. *Id.*

111. 572 So. 2d 940 (Fla. 5th Dist. Ct. App. 1990), *review denied*, 583 So. 2d 1036 (Fla. 1991).

112. *Id.* at 942 (emphasis added).

113. *Id.*

114. *Dupree*, 656 So. 2d at 431.

Florida followed prior rulings of the Supreme Court of the United States[115] and found that where statements do not fall within firmly rooted hearsay exceptions, they are presumptively unreliable and inadmissible for Confrontation Clause purposes.[116] The Supreme Court of Florida declined to expand child hearsay statements to statements made by children who were not victims. Therefore, for hearsay statements of a child to be admissible under section 90.803(23) of the *Florida Statutes*, "the prosecution of the defendant must be based upon the victimization of the child whose statements are being related."[117]

VII. AUTHENTICATION

In *Macht v. State*,[118] the Fourth District Court of Appeal attempted to clear up a misconception regarding the use of transcripts when a tape recorded conversation has been admitted into evidence. In *Macht*, the arresting officer testified that he pulled the defendant's car over.[119] The officer was tape recording the conversation with the defendant from the moment he stopped the defendant's car.[120] At trial, the tape of the conversation was admitted into evidence through the arresting officer who made the tape.[121] However, the defendant claimed that the trial court committed reversible error by allowing the jury to view the transcript, which was not properly authenticated, of the tape recording that had been entered into evidence.[122]

The district court stated that the rule announced in *Stanley v. State*,[123] prohibiting the use of transcripts of tapes when the tapes have been introduced into evidence, has been superseded by the Supreme Court's of Florida's ruling in *Hill v. State*.[124] *Hill* authorized a jury to view an accurate transcript of an admitted tape recording as an aid in understanding

115. *See* Idaho v. Wright, 497 U.S. 805, 818 (1990); Lee v. Illinois, 476 U.S. 530, 543 (1990).

116. *Dupree*, 656 So. 2d at 431.

117. *Id.* at 432.

118. 642 So. 2d 1137 (Fla. 4th Dist. Ct. App. 1994).

119. *Id.* at 1138.

120. *Id.*

121. *Id.*

122. *Id.* The Fourth District Court of Appeal recognized that many jurisdictions cite the case of Stanley v. State, 451 So. 2d 897 (Fla. 4th Dist. Ct. App. 1984), for the proposition that trial courts should not allow the use of transcripts of tapes when the tapes have been introduce into evidence. The district court attempted to clear up this misconception.

123. 451 So. 2d 897 (Fla. 4th Dist. Ct. App. 1987).

124. 549 So. 2d 179 (Fla. 1989).

the tape so long as the unadmitted transcript does not go back to the jury room or become a focal point of the trial.[125]

During trial, the defendant in *Macht* objected that the transcript of the tape was not properly authenticated because the individual who prepared the transcript did not testify.[126] However, the arresting officer who made the tape recording testified at trial that the transcript was accurate.[127] Since the arresting officer testified that the transcripts were an accurate reproduction of the tape recordings, no further authentication or proof was needed.[128] Additionally, the trial court clearly instructed the jury that if there were any discrepancies between the tape and the transcript, the jury should rely on the tape, since it was the tape that was in evidence.[129] Hopefully, the district court's opinion will help clarify any further problems with the use of transcripts at trial when a tape recording has been admitted.

VIII. ADDITIONS AND AMENDMENTS TO THE *FLORIDA EVIDENCE CODE*

During the survey period, the Florida Legislature made various additions and amendments to the *Florida Evidence Code*. The new Code sections bear directly on the admissibility of evidence at trial.

A. *Gender-Neutral Language*

The *Florida Evidence Code* was rewritten in gender-neutral language.[130] When possible, the Code employed the use of plural instead of singular pronouns to avoid both gender-specific language and awkwardness. Changes made for gender-neutral purposes were made throughout the Code, and are not detailed in this article. No substantive changes were intended by these amendments.

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125. *Id.* at 182.

126. *Macht*, 642 So. 2d at 1138.

127. *Id.*

128. *Id.*

129. *Id.* at 1138-39. The trial transcripts did not go back to the jury room and did not become a focal point of the trial. Therefore, the use of the transcripts as an aid in understanding the tape was proper. *Hill*, 549 So. 2d at 182.

130. *See, e.g.*, Ch. 95-147, § 471, 1995 Fla. Sess. Law Serv. 171, 538 (West) (amending FLA. STAT. §90.105 (1993)).

B. *Domestic Violence Advocate-Victim Privilege*

A new privilege was also added to the *Florida Evidence Code*.[131] Section 90.5036 now allows communications between a domestic violence

131. Ch. 95-187, § 7, 1995 Fla. Sess. Law Serv. 1368, 1371-72 (West) (to be codified at FLA. STAT. § 90.5036). The section reads as follows:

> 90.5036. Domestic violence advocate-victim privilege
>
> (1) For purposes of this section:
>
> (a) A "domestic violence center" is any public or private agency that offers assistance to victims of domestic violence, as defined in s. 741.28, and their families.
>
> (b) A "domestic violence advocate" means any employee or volunteer who has 30 hours of training in assisting victims of domestic violence and is an employee of or volunteer for a program for victims of domestic violence whose primary purpose is the rendering of advice, counseling, or assistance to victims of domestic violence.
>
> (c) A "victim" is a person who consults a domestic violence advocate for the purpose of securing advice, counseling, or assistance concerning a mental, physical or emotional condition cause by an act of domestic violence, an alleged act of domestic violence, or an attempted act of domestic violence.
>
> (d) A communication between a domestic violence advocate and a victim is "confidential" if it relates to the incident of domestic violence for which the victim is seeking assistance and if it is not intended to be disclosed to third persons other than:
>
> 1. Those persons present to further the interest of the victim in the consultation, assessment, or interview.
>
> 2. Those persons to whom disclosure is reasonably necessary to accomplish the purpose for which the domestic violence advocate is consulted.
>
> (2) A victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made by the victim to a domestic violence advocate or any record made in the course of advising, counseling, or assisting the victim. The privilege applies to confidential communications made between the victim and the domestic violence advocate and to records of those communications only if the advocate is registered under s. 415.605 at the time the communication is made. This privilege includes any advice given by the domestic violence advocate in the course of that relationship.
>
> (3) The privilege may be claimed by:
>
> (a) The victim or the victim's attorney on behalf of the victim.
>
> (b) A guardian or conservator of the victim.
>
> (c) The personal representative of a deceased victim.
>
> (d) The domestic violence advocate, but only on behalf of the victim.
>
> The authority of a domestic violence advocate to claim the privilege is presumed in the absence of evidence to the contrary.

Id.

worker and a victim to be privileged.[132] The new section provides for those persons to whom the communication can be disclosed without waiving the privilege.[133] The new section also has a provision regarding the confidentiality of records and who may claim the privilege.[134]

C. *Mode and Order of Interrogation and Presentation*

During the survey period, the Florida Legislature altered subsection three of section 90.612 of the *Florida Statutes*, which deals with the use of leading questions.[135] The section appears to merely codify parts of rule 1.450(a) of the *Florida Rules of Civil Procedure*, dealing with evidence and the interrogation of witnesses.[136] Subsection three reiterates the use of direct-examination questions on direct and leading questions on cross-examination, with some caveats. The amendment to subsection three allows leading questions on direct-examination when attempting to develop a

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132. *Id.* (to be codified at FLA. STAT. § 90.5036(1)(d)).

133. *Id.* (to be codified at FLA. STAT. § 90.5036(1)(d)(1), (2)).

134. *Id.* (to be codified at FLA. STAT. § 90.5036(2), (3)).

135. Ch. 95-179, § 1, 1995 Fla. Sess. Law Serv. 1307, 1308 (West) (amending FLA. STAT. § 90.612(3) (1993)). The section was amended to read as follows:

> 90.612. Mode and order of interrogation and presentation.
>
> (3) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, and adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. ~~Except as provided by rule of court or when the interests of justice otherwise require.~~
>
> ~~(a) A party may not ask a witness a leading question on direct or redirect examination.~~
>
> ~~(b) A party may ask a witness a leading question on cross-examination or re-cross-examination.~~

Id.

136. FLA. R. CIV. P. 1.450(a). This section reads as follows:

> Rule 1.450 EVIDENCE
>
> (a) Adverse Witness. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party and interrogate that person by leading questions and contradict and impeach that person in all respects as if that person had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also and may be cross-examined by the adverse party only upon the subject matter of that witness' examination in chief.

Id.

witness' testimony, when the witness is hostile, an adverse party, when the witness is identified with an adverse party, or when the interests of justice otherwise require it.[137]

D. *Hearsay Exception: Statement of Elderly Person or Disabled Adult*

During the survey period a new hearsay exception was added to the *Florida Evidence Code*.[138] Section 90.803(24) now allows the statement

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137. Ch. 95-179, § 1, 1995 Fla. Sess. Law Serv. at 1308 (West) (amending FLA. STAT. § 90.612(3) (1993)).

138. Ch. 95-158, § 1, 1995 Fla. Sess. Law Serv. 1263, 1263-64 (West) (to be codified at FLA. STAT. § 90.803(24)). The section reads as follows:

> 90.803. Hearsay exceptions; availability of declarant immaterial.
>
> The provision of § 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:
>
> (24) HEARSAY EXCEPTION; STATEMENT OF ELDERLY PERSON OR DISABLED ADULT.
>
> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person or disabled adult, as defined in s. 825.101, describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant elderly person or disabled adult, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
>
> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; and
>
> 2. The elderly person or disabled adult either:
>
> a. Testifies; or
>
> b. Is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the elderly person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm in addition to findings pursuant to s. 90.804(1).
>
> (b) In a criminal action, the defendant shall be notified no later than 10 days before the trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the elderly person's or disabled

of an elderly or disabled person describing any act of abuse, neglect, exploitation, battery, aggravated battery, assault, aggravated assault, sexual battery, or any other violent act on the declarant into evidence in any civil or criminal proceeding.[139] The statements are admissible if certain prerequisites are met.

For this hearsay testimony to be admissible, the trial court must hold a hearing regarding the time, content, and circumstances of the statement to ensure its reliability.[140] The factors the court is to consider in this determination are the mental and physical age of the elderly or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion of the elderly or disabled adult, and any other appropriate factor.[141]

In addition to the trial court's initial findings, the elderly or disabled person must either testify or be unavailable.[142] Unavailability includes a finding that the trial or proceeding would result in severe emotional, mental or physical harm, in addition to findings of unavailability which the court must make under section 90.804(1).[143]

In criminal proceedings, a notice provision has been added before any hearsay statement falling under section 90.803(24) can be used.[144] Since any mention of civil actions was excluded from this notice provision section, it naturally follows that the ten-day notice provision is not applicable to civil

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adult's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its rulings under this subsection.

Id.

139. *Id.*

140. *Id.* (to be codified at FLA. STAT. § 90.803(24)(a)(1)).

141. *Id.*

142. Ch. 95-158, § 1, 1995 Fla. Sess. Law Serv. at 1263 (West) (to be codified at FLA. STAT. § 90.803(24)(a)(2)(a), (b)). The prerequisite of § 90.803(24)(a), regarding unavailability, will cause confusion with its inclusion in this section of hearsay since § 90.803 exceptions do not require the declarant to be unavailable. The availability of the declarant is immaterial to use of hearsay under § 90.803. Unavailability as a factor before the hearsay statement can be used is more appropriately utilized in § 90.804. Perhaps the better procedure would have been to split the new hearsay exception into two separate sections in the evidence code, one in § 90.803 and one in § 90.804, to avoid confusion and keep the evidence code in proper form. Availability immaterial under § 90.803; Declarant unavailable under § 90.804. It appears that this simple solution was not considered.

143. *Id.* (to be codified at FLA. STAT. § 90.803(24)(a)(2)(b)).

144. *Id.* (to be codified at FLA. STAT. § 90.803(24)(b)).

actions.[145] However, the trial judge must make specific findings of fact on the record whenever section 90.803(24) is utilized. This requirement applies to both criminal and civil actions.[146]

IX. CONCLUSION

The Supreme Court of Florida's resolution of conflicts between jurisdictions on expert evidence and child hearsay will help trial judges and attorneys better prepare their cases. However, the supreme court's occasional blatant disregard in overturning a lower court's decision when the error has neither been preserved nor found to be fundamental, continues to be an area of some consternation. The legislature's addition of yet another hearsay exception and evidentiary privilege is sure to generate additional case law in the coming year, and keep our appellate courts busy.

145. *Id.*

146. *Id.* (to be codified at FLA. STAT. § 90.803(24)(c)).

Juvenile Law: 1995 Survey of Florida Law

Michael J. Dale*

TABLE OF CONTENTS

I. INTRODUCTION

This year marks a respite from the frenetic pace of recent legislative efforts in Florida to respond to the perceived problems in Florida's juvenile justice system.[1] This survey briefly highlights the legislative changes. On

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1. For a discussion of legislative changes from 1989 through 1994, see Michael J. Dale, *Juvenile Law: 1994 Survey of Florida Law*, 19 NOVA L. REV. 139 (1994) [hereinafter *1994 Survey*]; Michael J. Dale, *Juvenile Law: 1993 Leading Cases and Significant Developments in Florida Law*, 18 NOVA L. REV. 541 (1993) [hereinafter *1993 Leading Cases*]; Michael J. Dale, *Juvenile Law: 1992 Survey of Florida Law*, 17 NOVA L. REV. 335 (1992) [hereinafter

the other hand, the appellate courts remained active, continuing a long-standing process of correcting trial court excesses and blatant failures to comply with the provisions of the juvenile code. Finally, the state supreme court heard several cases on narrow issues of juvenile law, as well as one significant case involving privacy and a minor's consensual sexual activity and a second involving the liability of the Department of Health and Rehabilitative Services ("HRS") for negligent allocation of services to dependent and delinquent children.

II. DELINQUENCY

A. *Detention Issues*

Previous survey articles in this law review have dealt with Florida's changing approach to juvenile detention over the past fifteen years and have studied the large number of recent appellate cases interpreting the detention laws.[2] It is no different this year.

Chapter 39 of the *Florida Statutes* requires that an intake counselor who receives custody of the child from a law enforcement agency review the law enforcement report or probable cause affidavit to determine whether detention of a child on delinquency charges is required.[3] In doing so, the counselor bases his or her decision on whether or not to hold the child in secure or non-secure detention on an assessment of risk that the child will not appear and/or will commit other offenses.[4] The decision is premised upon a risk assessment instrument ("RAI"), a procedure developed by the Department of Juvenile Justice.[5] The RAI is based upon statutory detention guidelines including, most significantly, the charge against the child. Even when the charge is not significant enough to securely detain the child, the court still has discretion to securely detain the child if it finds clear and

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1992 Survey]; Michael J. Dale, *Juvenile Law: 1991 Survey of Florida Law*, 16 NOVA L. REV. 333 (1991) [hereinafter *1991 Survey*]; Michael J. Dale, *Juvenile Law: 1990 Survey of Florida Law*, 15 NOVA L. REV. 1169 (1990) [hereinafter *1990 Survey*]; Michael J. Dale, *Juvenile Law*, 14 NOVA L. REV. 859 (1990) [hereinafter *Juvenile Law*]; Michael J. Dale, *Juvenile Law*, 13 NOVA L. REV. 1159 (1989); *see also* THE FLORIDA BAR CONTINUING LEGAL EDUCATION, FLORIDA JUVENILE LAW AND PRACTICE (4th ed. 1995).

2. *1994 Survey*, *supra* note 1, at 150-51; *1993 Leading Cases*, *supra* note 1, at 552-54; *1992 Survey*, *supra* note 1, at 348-53.

3. FLA. STAT. § 39.044(1) (Supp. 1994).

4. *See id.* § 39.042(1).

5. *See id.* § 39.042(2)(b).

convincing evidence that the minor is a clear and present danger to himself or the community.[6]

In *T.L.W. v. Soud*,[7] the First District Court of Appeal was asked to determine whether the trial court had properly applied its discretionary standard to securely detain a child. After examining the facts, the appellate court found that it did.[8] In addition, the court held that a writ of habeas corpus is a proper remedy for a minor held in secure detention, although statutory language would appear to indicate otherwise.[9] However, the court also held that rule 8.130 of the *Florida Rules of Juvenile Procedure* provides for trial court reconsideration of the issue through a motion for rehearing.[10] The appellate court expressly held that in the future, a trial court's reconsideration of a claim that secure detention is contrary to law shall be required prior to filing a writ for habeas corpus in the appellate court.[11]

In *S.A.M. v. Bessette*,[12] a juvenile filed a petition for a writ of habeas corpus, alleging illegal detention in violation of chapter 39. The juvenile was charged with two counts of grand theft and was detained for failure to appear on at least two previous occasions.[13] The statute provides that a child may be held in secure detention if he or she meets the detention admission criteria.[14] A child may be placed in secure detention even when not provided under the RAI computation system.[15] However, as noted above, the court must state in writing clear and convincing reasons for such placement.[16] In the *S.A.M.* case, the child did not meet the statutory detention criteria because she was not charged with a crime articulated in the statute as warranting detention.[17] The only basis for detention articulated by the court was the allegation that the child was in contempt of court

6. *Id.* § 39.044(2).
7. 645 So. 2d 1101 (Fla. 1st Dist. Ct. App. 1994).
8. *Id.* at 1106.
9. *Id.* at 1104. *See also* FLA. STAT. § 39.044(5)(a).
10. *T.L.W.*, 645 So. 2d at 1105 n.2.
11. *Id.*
12. 641 So. 2d 948 (Fla. 2d Dist. Ct. App. 1994).
13. *Id.* at 949.
14. *See generally* FLA. STAT. § 39.044.
15. *Id.*
16. *Id.* § 39.044(2)(f), which states: "If the court orders a placement more restrictive than indicated by the results of the risk assessment instrument, the court shall state, in writing, clear and convincing reasons for such placement." *Id.*
17. *S.A.M.*, 641 So. 2d at 949.

for failure to appear.[18] Since the trial court failed to show grounds to override the statute, the appellate court granted the writ and ordered the discharge of the child.[19]

B. *Trial Issues*

Following the Supreme Court of the United State's 1967 decision in *re Gault*,[20] Florida provided each child with a statutory right to counsel.[21] In *Washington v. State*,[22] the Third District Court of Appeal was faced with the question of whether the trial court could hold a detention hearing pursuant to rule 8.305(b) of the *Florida Rules of Juvenile Procedure* in the absence of counsel for the child. In an ill-considered opinion, devoid of statutory authority, the court held that counsel was not necessary.[23] Relying solely upon rule 8.305(b)(1), the court held that, "the rule does not entitle defendant to counsel at this early stage in the juvenile adjudicatory process. A detention hearing is merely an informal, non-adversarial proceeding to inform defendant of the right to counsel in future proceedings and determine whether probable cause exists to further detain defendant."[24]

The court's decision is incorrect for two reasons. First, it apparently failed to consider the Florida statute governing a child's right to counsel in delinquency proceedings. Section 39.041 of the *Florida Statutes* provides that a child is entitled to representation by legal counsel "at all stages of any proceedings under this part."[25] By "part," of course, the legislature meant chapter 39 of the juvenile code. Furthermore, this section provides that the lawyer representing the child shall provide counsel "at any time subsequent to the child's arrest, including *prior* to a detention hearing while in secure

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18. *Id.*

19. *Id.*

20. 387 U.S. 1 (1967) (recognizing the child's constitutional right to counsel, including an attorney free of charge if indigent, right to notice, right to an opportunity to be heard, and other protections in a juvenile delinquency case).

21. FLA. STAT. § 39.041 (1993).

22. 642 So. 2d 61 (Fla. 3d Dist. Ct. App. 1994).

23. *Id.* at 63. It is interesting to note that the appellant appealed pro per for post conviction relief pursuant to rule 3.850 of the *Florida Rules of Criminal Procedure* from a conviction as an adult on the charges, although the defendant was sixteen at the time of the arrest. "Pro per" is short for propria persona, which means "in one's own proper person." BLACK'S LAW DICTIONARY 792 (6th ed. 1990). It is essentially the same as "pro se," or representation without a lawyer.

24. *Washington*, 642 So. 2d at 63.

25. FLA. STAT. § 39.041.

detention care."[26] The second fallacy in the court's reasoning is that the detention hearing is, or ought to be, a serious adversary proceeding wherein it is determined whether secure detention, in particular, is appropriate. Detention away from home in a locked setting is a serious issue involving a deprivation of liberty with due process ramifications and ought not be cavalierly disregarded by the courts.[27]

Chapter 39 contains provisions for legal representation of the child, and interim medical and mental health services to the youngster. It allows the trial court to order psychological evaluations in delinquency cases and to require treatment both for alleged and adjudicated delinquent children.[28] However, the development of psychological evaluations on behalf of the juvenile defendant by his or her lawyer in preparing a defense is separate and distinct from the court's power to order services.

In *H.A.W. v. State*,[29] the Public Defender's Office requested and paid for a psychological evaluation of the child to aid in his defense. Apparently, the evaluation was performed after the child admitted to the charges. The evaluation was available to the defense before the dispositional hearing and thus would have been available for use in arguing for various dispositional alternatives.[30] The trial court ordered the defense counsel to release the psychological evaluation to the HRS to aid in the child's treatment after disposition. An appeal followed. The appellate court held that the disclosure of information received from an expert retained to assist the defendant's counsel in preparing a defense violated the child's attorney/client privilege.[31] According to the appellate court, the fact that the child had been adjudicated and sentenced before the court ordered the release of the evaluation was irrelevant.[32] The adjudication did not constitute a waiver of the child's privilege under *Florida Statutes* sections

26. *Id.* § 39.041(1) (emphasis added).

27. *Cf. 1992 Survey*, *supra* note 1, at 343. For a discussion of the severity of secure detention in Florida, see Michael J. Dale & Carl Sanniti, *Litigation as an Instrument for Change in Juvenile Detention: A Case Study*, 39 CRIME & DELINQ. 49 (1992). For a comparison with other states that recognize a right to counsel during a detention hearing see Baumer v. State, 777 S.W.2d 847 (Ark. 1989); *In re* Jesse P., 5 Cal. Rptr. 2d 321 (Ct. App. 1992); T.K. v. State, 190 S.E.2d 588 (Ga. Ct. App. 1972); People v. Giminez, 319 N.E.2d 570 (Ill. App. Ct. 1974); State *ex rel.* M.C.H. v. Kinder, 317 S.E.2d 150 (W. Va. 1984).

28. *See* FLA. STAT. § 39.046(1)-(3) (Supp. 1994).

29. 652 So. 2d 948 (Fla. 5th Dist. Ct. App. 1995).

30. *Id.* at 949.

31. *Id.*

32. *Id.*

90.502 and 90.503 which govern the attorney/client privilege in Florida.[33] The court then quashed the order requiring counsel to provide the psychological evaluation to HRS.[34]

A difficult problem for the juvenile court is how to cope with a delinquent child who has been determined incompetent to proceed with an adjudicatory hearing because of his or her level of mental retardation. In *Department of Health & Rehabilitative Services v. State*,[35] HRS appealed from orders in four delinquency cases. In each case, the trial court found the youngster incompetent, then ordered HRS to begin proceedings for involuntary hospitalization and, if the child did not qualify, to place the child in a long-term mental health treatment facility.[36] In the interim, the court ordered that the children be held by HRS. The trial court relied upon *Florida Statutes* section 916.13, which governs procedures for court ordered involuntary commitment of adult defendants who are determined to be incompetent to stand trial or be sentenced. However, the appellate court found that the statute did not apply to juvenile delinquency proceedings, basing its opinion upon the language of section 916.13, which speaks of "defendants," "standing trial," "sentencing," and "criminal court."[37] The appellate court recognized that rule 8.095 of the *Florida Rules of Juvenile Procedure* is the only procedure that is expressly available for juveniles who are incompetent to proceed in delinquency adjudicatory hearings.[38] The appellate court found that the reference in the *Florida Rules of Juvenile Procedure* is to section 394, known as the "Baker Act" proceeding which provides for involuntarily commitment of the severely retarded but does not involve "hospitalization."[39]

However, the court noted that the juvenile rule had been amended to allow for non-delinquent treatment including hospitalization and its effective date was January 26, 1995.[40] Thus, while the appellate court ruled that section 916.13 was inapplicable and the trial court lacked the power to order the involuntary commitment of a child alleged to be delinquent, the trial court was directed to proceed under the juvenile rules.[41] Under the new

33. *Id.*
34. *H.A.W.*, 652 So. 2d at 949.
35. 655 So. 2d 227 (Fla. 5th Dist. Ct. App. 1995).
36. *Id.* at 228.
37. *Id.*
38. *Id.*
39. *Id.* at 228-29.
40. *HRS v. State*, 655 So. 2d at 229.
41. *Id.*

rule, the court may now order treatment for a period of up to two years.[42] Thus, the court may now seek a section 393 and section 394 commitment.[43]

C. *Adjudicatory Issues*

In an important decision affecting juveniles, the Supreme Court of Florida in *B.B. v. State*[44] was asked to answer the question of whether Florida's constitutional provision governing privacy makes *Florida Statutes* section 794.05, governing unlawful carnal intercourse, unconstitutional as it pertains to a minor's consensual sexual activity. The appellant was charged under *Florida Statutes* section 794.05 and filed a motion to declare the statute unconstitutional as violative of his right to privacy and to dismiss the petition. The petition was granted and the State appealed. Specifically, the court was asked to determine whether a minor who engages in unlawful carnal intercourse with an unmarried minor can be adjudicated to have committed a felony of the second degree in light of the minor's right to privacy guaranteed by the *Florida Constitution.*[45] In an opinion by Justice Wells, the court relied upon *In re T.W.*, in which the Supreme Court of Florida had recognized that the right of privacy in article I, section 23 of the *Florida Constitution* extends to minors.[46] The *B.B.* court held that the minor had a legitimate expectation of privacy in carnal intercourse because it is by express definition an intimate act.[47] In order to hold the child criminally accountable, the court said that a compelling state interest must be found to overcome the right to privacy.[48] It was conceded by the court that Florida does have an obligation and a compelling interest in protecting children from sexual activity before they have sufficiently matured to make appropriate decisions.[49] However, in a minor-minor situation, unlike an adult-minor situation, the prevention of exploitation rationale is nonexistent.[50] In the minor-minor situation, the statute, according to the court, is used as a weapon to adjudicate a minor delinquent rather than as a shield

42. *Id.*
43. *Id.*
44. 659 So. 2d 256 (Fla. 1995).
45. *Id.* at 257.
46. *Id.* (citing *In re* T.W., 551 So. 2d 1186, 1193 (Fla. 1989)).
47. *Id.* at 259.
48. *Id.*
49. *B.B.*, 659 So. 2d at 259.
50. *Id.*

to protect the minor.[51] The court therefore held the statute unconstitutional as applied to the minor.[52]

In *B.H. v. State*,[53] the Supreme Court of Florida recently resolved a conflict between the district courts of appeal over the constitutionality of the juvenile escape statute.[54] The First and Fifth District Courts of Appeal were at odds over the constitutionality of section 39.061 of the juvenile code, which is the statute governing escapes from juvenile facilities. In fact, the more significant issue the court resolved dealt with the role that the administrative agency, here HRS, could take in defining the elements of a crime.[55] After the court analyzed both federal and state precedent, it found that the power to create crimes and punishments rests solely in the legislative branch.[56] Further, the court held that administrative agencies do not have the authority to create a criminal statute or its equivalent, nor can they prescribe the penalty.[57] The court concluded that the statute violated two constitutional doctrines: the non-delegation doctrine, in which the legislature authorized the administrative agency to decide exactly for which categories of juvenile incarceration escape would be a felony and the vagueness doctrine, resulting from the failure of the legislature to articulate in the statute the activity for which escape would constitute a felony.[58] The latter failure was a violation of the due process rights of the child. In other words, the statute failed to give notice of the prohibited act.[59] Despite having concluded that the statute was unconstitutional, under the doctrine of statutory revival, the court applied the predecessor statute, holding it constitutional, and upheld the adjudication of escape.[60] In his dissenting opinion, Justice Kogan argued that once the current statute was rendered unconstitutional, the appellate court lacked the authority to review the prior statute because doing so violated the child's due process rights due to the lack of notice of prohibited conduct and the denial of the child's opportunity to defend against the revised statute.[61]

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51. *Id.* at 260.
52. *Id.*
53. 645 So. 2d 987 (Fla. 1994), *cert. denied*, 115 S. Ct. 2559 (1995).
54. *Id.* at 995.
55. *Id.* at 990.
56. *Id.* at 992.
57. *Id.* at 992-93.
58. *B.H.*, 645 So. 2d at 994.
59. *Id.* at 994.
60. *Id.* at 995-96.
61. *Id.* at 997.

D. *Dispositional Issues*

As noted in prior survey articles, chapter 39 contains a variety of dispositional choices available to the juvenile court including restitution, community control, and commitment to various facilities operated or supervised by the Department of Juvenile Justice.[62] Proper use of Florida's restitution statute arises regularly in appellate case law.[63] Defining the limitations on the use of an order for restitution was recently before the Supreme Court of Florida in *C.W. v. State*.[64] The specific issue was whether the grant of authority under the Florida juvenile code provision governing restitution includes damage for pain and suffering. The appellants pled no contest to charges of aggravated battery. The trial court placed the appellants on community control and ordered them and their parents to pay restitution, including services for a psychologist, dental surgeon, and hospital, and then ordered payment for the victim's pain and suffering.[65] The court held that the language of the statute[66] which referred to any damage caused by the child's offense, by its plain language, should include pain and suffering because such damages have long been recognized as compensable damages in Florida.[67]

However, ordering restitution is not without limitation under the Florida statute. Thus, in *K.M.G. v. State*,[68] a juvenile appealed a trial order imposing $1500 in restitution to compensate a victim for damage to his car. The appellant was not charged with the theft of the vehicle, but merely for trespass in a conveyance.[69] In other words, the appellant was simply riding in the vehicle before the police attempted to stop the car. The appellant and the driver both jumped out of the car at different points in time, and the damage to the vehicle was caused by the resulting crash. After examining the record, the court concluded that there was no evidence that the appellant damaged the interior of the vehicle, that she encouraged the driver to

62. *See* FLA. STAT. § 39.054; *1994 Survey*, *supra* note 1, at 153-56; *1993 Leading Cases*, *supra* note 1, at 555-58; *1992 Survey*, *supra* note 1, at 358-61. Supervision of delinquency services was transferred from HRS to the Department of Juvenile Justice on October 1, 1994. *See* FLA. STAT. § 39.021.

63. *See 1994 Survey*, *supra* note 1, at 154-53; *1993 Leading Cases*, *supra* note 1, at 556-57; *1992 Survey*, *supra* note 1, at 358-59.

64. 655 So. 2d 87 (Fla. 1995).

65. *Id.* at 88.

66. *See* FLA. STAT. § 39.054(1)(f) (1993).

67. *C.W.*, 655 So. 2d at 89.

68. 652 So. 2d 481 (Fla. 2d Dist. Ct. App. 1995).

69. *Id.* at 482.

abandon the vehicle, that she was part of a joint venture under tort law, or that there was a conspiracy, so as to hold the appellant vicariously liable.[70] The appellate court reversed the restitution award because the record did not establish that the appellant was anything other than a passenger.[71]

In *J.B. v. State*,[72] the issue was whether it was error to order restitution for lost wages attributable to the victims' attendance as witnesses at the restitution hearing in a delinquency case. The First District Court of Appeal held that it was not.[73] The court concluded that strict construction must be given to the juvenile restitution statute.[74] There is no reference to lost wages in the statute. Furthermore, the wages were not causally related to the commission of the crime, but resulted from the witnesses' attendance at the hearing. The court therefore reversed.[75]

Finally, in a technical holding, the Second District Court of Appeal, in *C.B. v. State*,[76] reversed a restitution order where the trial court neither ordered restitution nor reserved jurisdiction to do so at the time of the dispositional order. After the child pled guilty to the commission of a battery, the trial court withheld adjudication and ordered the child to enter and complete juvenile arbitration. The court did not order restitution or reserve jurisdiction to do so. Four months later, the court held the restitution hearing and assessed $127.47 in restitution.[77] On appeal, the court held that once the trial court entered its order at the jurisdictional stage, it lacked jurisdiction to enter an order of restitution.[78]

One dispositional alternative which is not available to the juvenile court is to order deportation. Incredibly, one trial court in Collier County tried to do so. In *I.H. v. State*,[79] the Second District Court of Appeal quickly reversed the finding that while the trial court was permitted to recommend deportation to the federal authorities, it did not have authority to order the deportation.[80]

A recurring problem with juvenile dispositional rulings is the trial courts' disregard of the requirement to provide specific written findings for

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70. *Id.*
71. *Id.*
72. 646 So. 2d 808 (Fla. 1st Dist. Ct. App. 1994).
73. *Id.* at 809.
74. *Id.*
75. *Id.*
76. 647 So. 2d. 964 (Fla. 2d Dist. Ct. App. 1994).
77. *Id.* at 964.
78. *Id.* at 965.
79. 656 So. 2d 622 (Fla. 2d Dist. Ct. App. 1995).
80. *Id.* at 622.

the imposition of an adult sentence, rather than a juvenile sentence as provided by *Florida Statutes* section 39.059(7)(d).[81] The leading case in this area is *Troutman v. State*.[82] In *Troutman*, a juvenile pled nolo contendere to charges of false imprisonment and grand theft. The trial court found the sanction recommended in the predisposition report inadequate, and decided to treat the juvenile as an adult.[83] The court filed a conclusory written order explaining the rationale for the child's sentence of three years probation, three days after the sentencing occurred.[84] The Supreme Court of Florida reversed and held that the imposition of adult sanctions must be considered by analyzing the specific circumstances in the case with the statutory criteria before determination of the disposition.[85] Furthermore, the court was required to provide an individualized evaluation of how the juvenile fits within the enumerated statutory criteria contemporaneously with the sentencing.[86] Despite the clear statutory provision and the *Troutman* decision, appellate courts continue to remand cases to the trial courts to rectify their failure to provide the required written findings when sentencing juveniles as adults.[87] This subject also has been regularly reviewed in prior surveys.[88]

The problem continued this past year for cases still in the "pipeline," as noted by the Fourth District Court of Appeal in *Shaw v. State*.[89] However, by statute which became effective on October 1, 1994, the legislature gave in, apparently recognizing either the unwillingness or inability of the trial courts to carry out the law, and relieved the courts of the burden of making written findings.[90] The new section 39.059(7)(d) provides that a decision to impose adult sanctions must be in writing, but is

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81. FLA. STAT. § 39.059(7)(d) (Supp. 1994).

82. 630 So. 2d 528 (Fla. 1993).

83. *Id.* at 530.

84. *Id.*

85. *Id.* at 531.

86. *Id.* at 532.

87. *See, e.g.*, Jones v. State, 657 So. 2d 23 (Fla. 4th Dist. Ct. App. 1995); Pearson v. State, 657 So. 2d 21 (Fla. 2d Dist. Ct. App. 1995); Walker v. State, 656 So. 2d 950 (Fla. 5th Dist. Ct. App. 1995); Knight v. State, 656 So. 2d 593 (Fla. 2d Dist. Ct. App. 1995); Philmore v. State, 656 So. 2d 270 (Fla. 4th Dist. Ct. App. 1995); Gammage v. State, 655 So. 2d 183 (Fla. 4th Dist. Ct. App. 1995); Wood v. State, 655 So. 2d 1155 (Fla. 5th Dist. Ct. App. 1995); Crain v. State, 653 So. 2d 442 (Fla. 2d Dist. Ct. App. 1995); Satalino v. State, 652 So. 2d 1231 (Fla. 2d Dist. Ct. App. 1995); Sales v. State, 652 So. 513 (Fla. 4th Dist. Ct. App. 1995).

88. *See 1994 Survey*, *supra* note 1, at 155-56.

89. 645 So. 2d 68 (Fla. 4th Dist. Ct. App. 1994).

90. *See* FLA. STAT. § 39.059(7)(d).

presumed appropriate.[91] The court is not required to state specific findings or enumerate the criteria as a basis for its decision to impose adult sanctions on a juvenile.[92] The legislature's decision is unfortunate because it makes the appellate court's obligation to determine whether the child's transfer was appropriate more difficult. Now, the appellate court must look at the record on appeal to determine the trial court's rationale. Were the trial court simply to render a written opinion articulating its grounds, summary appellate affirmance would be easier. Furthermore, the legislature's capitulation is harmful to children because it may make the process of transfer to adult court easier in cases where there may be counter-vailing considerations which are now more difficult and time-consuming for defense counsel to present on appeal. Finally, and most discouraging, the change in the law demonstrates that the legislature recognized the seeming incapacity of the trial courts to do what judges are usually thought competent to do — make thoughtful written findings.

Like restitution, the proper use of community control is a recurring issue of appellate review in Florida.[93] Community control is Florida's term for probation, and the trial court has great discretion in the choice of devices available to correct juvenile behavior.[94] In *re D.S.*,[95] the Fourth District Court of Appeal upheld an order requiring the child not to associate with gang members as a condition of community control. However, the court specified that any violation of probation must be supported by a showing that the child knew that the individuals with whom he was associated were gang members.[96] In *B.B. v. State*,[97] the same appellate court was faced with the question of whether the requirement that a child obtain a General

91. *Id.*

92. *Id.* § 39.059(7)(d) states: "Any decision to impose adult sanctions must be in writing, but is presumed appropriate, and the court is not required to set forth specific findings or enumerate the criteria in this subsection as any basis for its decision to impose adult sanctions." *Id.*

93. *See 1994 Survey*, *supra* note 1, at 157-58; *1993 Leading Cases*, *supra* note 1, at 55-56; *1992 Survey*, *supra* note 1, at 358-59; *1991 Survey*, *supra* note 1, at 349-52; *see also* M.B. v. State, 655 So. 2d 1301 (Fla. 2d Dist. Ct. App. 1995) (holding that a sentence to community control for an indefinite period must be reversed because it exceeds the maximum sentence that can be imposed for the charge — a first degree misdemeanor).

94. *See In re* S.C., 645 So. 2d 138 (Fla. 4th Dist. Ct. App. 1994). The trial court placed conditions that the child must obtain a psychological evaluation, have a set curfew, attend school every day, and perform fifty hours of community service, which could be worked off by attending counseling. *Id.*

95. 652 So. 2d 892 (Fla. 4th Dist. Ct. App. 1995).

96. *Id.* at 892-93.

97. 647 So. 2d 268 (Fla. 4th Dist. Ct. App. 1994).

Equivalency Diploma ("G.E.D.") within one year, as a provision of community control, together with fifty hours of community service, an apology to the victim, and payment of $50 to the Florida Crime Compensation Fund, was unreasonable because it was unrelated to rehabilitation and further, because the child could not comply within the time allowed.[98] The court held that the legislature recognized the correlation between delinquency and lack of education and gave the trial court the power to require enrollment in school or other educational programs as a rehabilitative component of community control.[99]

Another element of the dispositional stage of a delinquency case in Florida involves payment of court costs. In *J.L. v. State*,[100] the child appealed from a finding of delinquency and an order to pay restitution and court costs. Relying on a 1994 district court of appeal opinion, in *J.A. v. State*,[101] the Second District Court of Appeal held that court costs may not be assessed because the child's adjudication was withheld.[102]

As part of its 1994 legislative effort to become tougher on juveniles, the Florida Legislature changed its juvenile code in the dispositional area to include the use of detention as a dispositional alternative in limited cases. As a punishment alternative, a minor may serve a five-day mandatory period of detention in a secure detention facility and perform 100 hours of community service for a first offense that involves the use or possession of a firearm.[103] In *State v. R.F.*,[104] an appeal involving a particularly narrow question, the Third District Court of Appeal held that the term "day" refers to a twenty-four hour period of time and not an "eight" hour work day as interpreted by the trial court when it rendered the dispositional order.[105] The appellate court did note, however, that the trial court had discretion to decide how the mandatory term was to be served.[106] The court explained that where the youngster is in school or working, the trial court may require the term be served on weekends.[107]

Under Florida law, a juvenile charged as a delinquent may not be sentenced as an adult. Florida law provides that after a child has been

98. *Id.* at 269.
99. *Id.* at 270 (citing FLA. STAT. § 39.053(2) (1993)).
100. 650 So. 2d 219 (Fla. 3d Dist. Ct. App. 1995).
101. 633 So. 2d 108 (Fla. 2d Dist. Ct. App. 1994).
102. *J.L.*, 650 So. 2d at 220.
103. *See* FLA. STAT. § 790.22(9)(a).
104. 648 So. 2d 293 (Fla. 3d Dist. Ct. App. 1995).
105. *Id.* at 294.
106. *Id.*
107. *Id.*

transferred by demand of the child, a voluntary or involuntary waiver hearing, based on a criminal information, or indictment, and has been convicted for the offense underlying the transfer, the child must be handled in every respect as if he or she were an adult "for any subsequent violation of state law" unless, as discussed above, the court imposes juvenile sanctions. In *T.L.P. v. State*,[108] a juvenile admitted to the charges of battery, criminal mischief, and violation of community control, and was adjudicated delinquent. Upon discovering that the juvenile was previously sentenced to four years in prison on an unrelated offense for which he was tried as an adult, the trial court sentenced the child to one year in county jail for each offense.[109] The appellate court held that since the juvenile offenses were committed before the child was convicted of the offense for which he was tried as an adult, the juvenile offenses were not subsequent violations under Florida law.[110] In order for a child to be subjected to adult penalties, the youngster must be charged as an adult by information or pursuant to a waiver hearing.[111] If the child has been adjudicated delinquent, the dispositional alternatives do not include incarceration in an adult facility.[112]

The Second District Court of Appeal addressed virtually the same issue in an *en banc* review in *Kazakoff v. State*.[113] In *Kazakoff*, all parties involved in the sentencing believed that the juvenile's prior treatment as an adult obviated the need to comply with the provisions of chapter 39 governing adult sentencing. In this case, as in *T.L.P.*, the offense for which the child was charged as a juvenile occurred before the commission of the offenses for which he was charged as an adult.[114] Thus, the offenses at issue in *Kazakoff* did not constitute subsequent violations of the law subjecting the child to adult sentencing.[115] A second issue before the court in *Kazakoff* was the proper application of Florida's transfer for adult prosecution statute.[116] The child claimed that the transfer order failed to contain any findings of fact with regard to two of the mandatory statutory

108. 657 So. 2d 49 (Fla. 2d Dist. Ct. App. 1995).
109. *Id.* at 49.
110. *Id.* at 50.
111. *Id.* at 49 (citing FLA. STAT. § 39.022(5)(d) (1993)).
112. *Id.*
113. 642 So. 2d 596 (Fla. 2d Dist. Ct. App. 1994); *see also* Thomas v. State, 657 So. 2d 51 (Fla. 2d Dist. Ct. App. 1995) (following *Kazakoff*).
114. *Kazakoff*, 642 So. 2d at 598.
115. *Id.* at 597.
116. *Id.*

transfer criteria found in section 39.052(2)(c) and 39.052(2)(e).[117] The district court of appeal recognized that there was a prior conflict in the appellate case law surrounding the effect of the trial court's failure to make the required statutory findings in the waiver order.[118] The appellate court chose to side with those courts that do not treat the deficiency as invalidating the juvenile's subsequent conviction as an adult, but rather require reversal and remand for the more limited purpose of entry of a proper order while leaving the conviction intact.[119]

E. *Appellate Issues*

Questions of what constitutes an appealable order in delinquency cases have come before the Florida courts on a number of occasions.[120] In *State v. Del Rey*,[121] the State filed a consolidated petition for writ of certiorari and appealed, seeking review of a non-final order of the juvenile court. The trial court waived jurisdiction over the child to adult criminal court, but first reduced three filed charges and precluded the state from filing an information charging the child as an adult for an offense other than those on which the court waived jurisdiction.[122] The appellate court dismissed the appeal for lack of jurisdiction finding there was no supreme court rule of procedure which authorizes the state to appeal from a non-final order in a juvenile delinquency case.[123] The court concluded that the *Florida Constitution* allows interlocutory appeals only to the extent provided by the Supreme Court of Florida rules.[124] Case law indicates that the *Florida Rules of Appellate Procedure* which allow non-final orders to be appealed do not apply in delinquency cases.[125] The court dismissed the petition for a writ of certiorari and held that certiorari lies only where the order to be reviewed may cause significant injury in subsequent proceedings in which the remedy by appeal will be inadequate.[126] The court concluded that the State had

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117. *Id.* at 598.
118. *Id.* at 599.
119. *Kazakoff*, 642 So. 2d at 599-600.
120. *See 1992 Survey*, *supra* note 1, at 554-55; *1993 Leading Cases*, *supra* note 1, at 364-65.
121. 643 So. 2d 1146 (Fla. 3d Dist. Ct. App. 1994).
122. *Id.* at 1147.
123. *Id.*
124. *Id.*
125. *Id.* (citing State v. M.G., 550 So. 2d 1122 (Fla. 3d Dist. Ct. App.), *review denied*, 551 So. 2d 462 (Fla. 1989)).
126. *Del Rey*, 643 So. 2d at 1148.

since charged the youngster in an information which was the subject of subsequent litigation.[127] The circuit court had not yet ruled on a motion by the child challenging the information.[128] If the court were to allow the information, the matter would be moot. If the motion were denied, it would be immediately appealable because, even though it is a final order, it is one dismissing the count of an information.[129] For these reasons the appeal and the certiorari petition were dismissed.[130]

F. *Legislation*

As noted, the Florida Legislature did not concentrate its efforts in the area of juvenile law this year. However, in an attempt to address the growing concern about juvenile sexual offenders, the legislature established a juvenile sexual offender statute.[131] After the adjudicatory hearing stage, the court may determine whether placement in a juvenile detention facility is in the best interest of the juvenile sexual offender and the public.[132] The court may require an examination of the juvenile by a psychologist, therapist, or psychiatrist, and have that person submit a report with a proposed plan of treatment for the child.[133] Accordingly, juvenile sexual offenders may, at the court's discretion, be ordered to community-based treatment as opposed to proceeding with a standard disposition hearing.[134]

Once a juvenile is adjudicated a sexual offender, the court may, subject to funding, commit the juvenile to the Department of Juvenile Justice for placement in a sexual offender facility or program.[135] At this point, the juvenile sexual offender is committed for an indefinite period of time until

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127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. For a definition of juvenile sexual offender, see ch. 95-267, § 43, 1995 Fla. Sess. Law Serv. 1833, 1866 (West) (to be codified at FLA. STAT. § 39.01(76)); *see also, id.* § 49, 1995 Fla. Sess. Law Serv. at 1871 (to be codified at FLA. STAT. § 415.50165(7)).

132. *Id.* § 45, 1995 Fla. Sess. Law Serv. at 1868 (to be codified at FLA. STAT. § 39.052(6)).

133. *Id.*

134. *See id.* § 45, 1995 Fla. Sess. Law Serv. at 1868-69 (to be codified at FLA. STAT. 39.052(6)).

135. Ch. 95-267, § 46, 1995 Fla. Sess. Law Serv. at 1869-70 (to be codified at FLA. STAT. § 39.054(1)(j)). *See generally id.* §§ 52-53, 1995 Fla. Sess. Law Serv. at 1874 (to be codified at FLA. STAT. § 415.504) (adding duties of the Task Force on Juvenile Sexual Offenders and the Victims of Juvenile Sexual Abuse and Crimes, and establishing criteria for mental health counselors).

the treatment program is completed, but treatment may not exceed the length of time an adult would serve for the same offense.[136] Also subject to appropriation, the treatment program must provide educational and psychological services to the juvenile, extending to aftercare counseling and monitoring upon release.[137] Once a juvenile sexual offender is placed in detention, the detention staff must provide adequate supervision to the other children in the facility, as well as notify school personnel and law enforcement agencies of the sexual offender's release from detention.[138]

The legislation also authorized the Department of Juvenile Justice to create secure juvenile assignment centers for committed youths who are, at a minimum, a moderate risk level.[139] The centers will house youths after the dispositional hearing pending placement in a residential commitment program.[140] At the centers the children will receive medical, academic, mental health, psychological, behavioral, sociological, substance abuse, and vocational testing.[141] The centers will determine the children's treatment needs and develop necessary treatment plans.[142] While staying at the center, the child shall be entitled to numerous short-term services, including educational, vocational, physical and mental health, substance abuse education, anger and impulse management training, and conflict resolution training.[143] The centers' staff will place the child in a commitment program based on the court ordered restrictiveness level, the evaluation by the centers' staff, and the geographic location of the child's family so that the family can participate in the rehabilitation.[144]

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136. *Id.* §§ 52-53, 1995 Fla. Sess. Law Serv. at 1874 (to be codified at FLA. STAT. § 415.504).

137. *See id.* § 48, 1995 Fla. Sess. Law Serv. at 1870 (to be codified at FLA. STAT. § 39.0571).

138. *Id.* § 44, 1995 Fla. Sess. Law Serv. at 1868 (to be codified at FLA. STAT. § 39.044(11)(a)-(b)).

139. Ch. 95-267, § 41, 1995 Fla. Sess. Law Serv. at 1866 (to be codified at FLA. STAT. § 39.0551).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Ch. 95-267, § 41, 1995 Fla. Sess. Law Serv. at 1866 (to be codified at FLA. STAT. § 39.0551).

III. DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS

A. *Adjudicatory Issues*

Dependency proceedings are often used as tactical devices in what are essentially divorce and custody disputes.[145] *Clock v. Clock*[146] is such a case. A stepmother filed a petition for dependency in an effort to stop the planned relocation of her stepson with the child's natural father from Florida to Colorado. The petition was brought because the child wanted to stay in Florida with the stepmother from whom the father had been divorced after nine years of marriage. The child remained with the stepmother after the divorce until the end of the school year when the father planned to move back to Colorado with the child. The petition alleged, among other things, that the father abandoned the child in Monroe County, Florida and that the child was in risk of neglect, abuse, or abandonment if he returned to Colorado with his father.[147] Finally, the petition alleged that the child did not wish to relocate to Colorado.[148] After hearing testimony, the trial court granted the petition for dependency despite an earlier finding that no abuse, neglect, or abandonment by the natural parents occurred.[149] Ultimately, the trial court returned the child to the custody of his father, but enjoined the father from relocating the child outside of Monroe County, except for summer vacations.[150] The natural parents (the mother residing in Colorado) appealed on the ground that the record did not support a finding of dependency. The appellate court held that the legislature never intended the dependency statute to subject an otherwise fit custodial parent to a charge simply because the parent sought to relocate the child against the child's wishes.[151] Thus, the court held that merely "relocating or separating a child from familiar surroundings by an otherwise fit and proper custodial parent against the child's wishes" is not abuse under the dependency provisions of Florida's juvenile code.[152]

Under Florida law, when a court makes a dependency finding it must prepare written findings of fact to support the order.[153] If a court fails to

145. *See 1992 Survey*, *supra* note 1, at 369.
146. 649 So. 2d 312 (Fla. 3d Dist. Ct. App. 1995).
147. *Id.* at 313.
148. *Id.*
149. *Id.* at 313-14.
150. *Id.* at 314.
151. *Clock*, 649 So. 2d at 314-15.
152. *Id.* at 315 (citing FLA. STAT. § 39.01(2), (10)(a) (1993)).
153. *See* FLA. STAT. § 39.409 (1993); FLA. R. JUV. P. 8.330(g).

do so, the case must be remanded for written findings of fact, as the court held in *Ash v. Department of Health & Rehabilitative Services*.[154] Further, as noted by the *Ash* court, written findings of fact are not rendered valid by the filing of a notice of appeal if they are written after jurisdiction has been lost.[155]

B. *Child Abuse Registry Reporting Issues*

Florida's child abuse and neglect reporting statute contains provisions for a central abuse registry and tracking system and due process controls to protect alleged perpetrators.[156] Child abuse reporting systems, including Florida's system, have generated substantial litigation. Cases involving implementation of the reporting system continue to regularly come before Florida's appellate courts.[157] In addition, a number of civil rights cases have been brought throughout the country challenging reporting systems.[158]

In *S.G. v. Department of Health & Rehabilitative Services*,[159] an appellant sought to have her name expunged from Florida's central child abuse registry and tracking system, causing a statutorily mandated administrative review process to ensue. At an administrative hearing, HRS introduced into evidence a dependency order entered by the circuit court in a parallel proceeding, but failed to argue collateral estoppel or res judicata. The hearing officer found that HRS did not satisfy its statutory burden of proof and recommended expunction. HRS rejected the officer's findings and the appeal followed.[160] The appellate court found, *inter alia*, that the agency incorrectly relied on a non-final dependency order which was the subject of a pending appeal.[161] In fact, two weeks after the agency's entry of its final order, the Third District Court of Appeal reversed and remanded the dependency order.[162] Incredibly, HRS declined to file a brief in *S.G.*, with the result of "leaving [the court] without any insight into the agency's

154. 649 So. 2d 305, 306 (Fla. 5th Dist. Ct. App. 1995).

155. *Id.*

156. *See* FLA. STAT. § 415.504(4) (Supp. 1994).

157. For a discussion of cases decided in earlier years, see *1993 Leading Cases*, *supra* note 1, at 551-52; *1991 Survey*, *supra* note 1, at 366-68.

158. *See, e.g.*, Doe v. Louisiana, 2 F.3d 1412 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1189 (1994); Watterson v. Page, 987 F.2d 1 (1st Cir. 1993).

159. 647 So. 2d 243 (Fla. 1st Dist. Ct. App. 1994).

160. *Id.* at 243.

161. *Id.* at 243-44.

162. *Id.* at 244.

present legal position."[163] The appellate court reversed and directed HRS to "enter an order consonant with the conclusions of law reached by the hearing officer."[164]

The constitutionality of the definitional language of the child abuse reporting statute came before the Supreme Court of Florida this past year in *Department of Health & Rehabilitative Services v. A.S.*[165] A single father sought to have his name removed from the HRS central abuse registry having been cited for neglect for leaving his six-year old son home alone for at least six hours. The father, a fish and wildlife officer, elected to take part in a stakeout to apprehend a suspect despite having no arrangements for child care. A report was made to HRS and the father was cited. The father challenged the statutory provision which provides that harm to a child's health or welfare can occur based upon the failure to provide "'the child with supervision or guardianship by specific acts or omissions of a serious nature requiring the intervention of the department or the court.'"[166]

The supreme court found that the legislature could not define with complete specificity all acts or omissions which are serious enough to fall within the act.[167] According to the court, whether a particular act is covered must be determined on a case-by-case basis.[168] However, the court concluded that the definition provides sufficient standards to be followed by HRS in carrying out its responsibility.[169] Finally, the court held that the standards to be followed relate to the governmental purpose if the goal is the prevention of harm to neglected children.[170] Although the court upheld the statute as constitutional, it concluded that it was inapplicable to the case at hand because the conduct of the father did not rise to the level where he should be classified as a perpetrator of child neglect.[171]

C. *Termination of Parental Rights Issues*

Florida's juvenile code contains four distinct grounds for termination of parental rights:

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163. *Id.*
164. *S.G.*, 647 So. 2d at 244.
165. 648 So. 2d 128 (Fla. 1995).
166. *Id.* at 129 (quoting FLA. STAT. § 415.503(9)(e) (Supp. 1990), *amended by* FLA. STAT. § 415.503(10)(e) (Supp. 1994)).
167. *Id.* at 131.
168. *Id.*
169. *Id.*
170. *A.S.*, 648 So. 2d at 131.
171. *Id.*

> 1) voluntary execution of a written surrender of the child; 2) the inability to identify or ascertain the location of a parent by diligent search; 3) egregious conduct by the parent that endangers the life, health, or safety of the child or the child's sibling; or 4) when the child has been adjudicated dependent, a case plan has been filed with the court, and the child continues to be abused, neglected, or abandoned by the parent.[172]

In a September 1994 opinion, the Supreme Court of Florida in *re T.M.*,[173] was presented with the question of whether a termination of parental rights case could go forward in a situation where there had been no provision for a performance agreement or permanent placement plan with the parent prior to the termination. Under the 1990 version of the termination statute, a performance agreement or permanent placement plan need not have been made available under section 39.464 in the situation of severe or continuing abuse or neglect and egregious abuse.[174] In *T.M.*, the father, whose parental rights had been terminated in the lower court, argued on appeal that sections 39.464(3) and (4) conflicted with section 39.467, which articulated the procedure for an adjudicatory hearing in termination of parental rights cases.[175] Section 39.467 required proof that either a performance agreement or permanent placement plan had been offered to the parent or that any of the elements of section 39.464 were met, and that the parent offered the agreement or plan has failed to substantially comply with it.[176] The Supreme Court of Florida held that the two sections of the law were not inconsistent.[177] Section 39.467 should be read in the disjunctive, and, therefore, termination could take place and be satisfied without offering a performance agreement.[178]

The appellant father also argued that termination of parental rights without a plan or an agreement violated his constitutional right to family integrity as articulated by the supreme court in *Padgett v. Department of Health & Rehabilitative Services*.[179] The supreme court held that performance agreements or permanent placement plans are not required in all

172. FLA. STAT. § 39.464.
173. 641 So. 2d 410 (Fla. 1994).
174. FLA. STAT. § 39.464(3)-(4) (1990).
175. *T.M.*, 641 So. 2d at 411.
176. *Id.*
177. *Id.* at 412.
178. *Id.*
179. *Id.* (citing Padgett v. Department of Health & Rehabilitative Servs., 577 So. 2d 565, 571 (Fla. 1991)); *see also 1991 Survey*, *supra* note 1, at 368-73.

instances and that the *Padgett* court used the term "ordinarily" to indicate that there might be exceptions.[180] This case is one of them.

As the listing above shows, one of the grounds for termination of parental rights is a voluntarily executed written surrender of the child, giving the youngster to HRS or to a licensed child-placing agency for subsequent adoption.[181] In any termination situation, there must be proof that the termination is in the manifest best interests of the child and that certain notice requirements have been met.[182] In *Henriquez v. Adoption Centre, Inc.*,[183] the Fifth District Court of Appeal was asked to revisit the issue of the grounds for revocation of the voluntary surrender. The case concerned a mother's appeal from a trial court decision terminating her parental rights when she voluntarily surrendered her nine-month old child to the adoption center, but when five days after doing so, she withdrew her waiver and consent and sought to have her child returned. The mother claimed at trial that termination was improper because the Florida statute governing termination was unconstitutional. She argued that it did not provide for a cooling-off period for parents who voluntarily execute a written surrender of the child. The mother argued further that she had surrendered her child under duress. On motion for rehearing *en banc*, the Fifth District Court of Appeal held that the supreme court previously upheld the constitutionality of the statute on due process and equal protection grounds in *re Adoption of Doe*.[184] The court held that the failure to provide a cooling-off period can only be remedied by the legislature.[185] The court also held that clear and convincing evidence showed that the surrender had been freely and voluntarily executed.[186]

In a lengthy dissent, Chief Judge Harris argued that there was no finding that termination was in the best interests of the child pursuant to the then applicable statute.[187] Chief Judge Harris's second argument was that *In re Adoption of Doe* did not consider a constitutional challenge to the

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180. *T.M.*, 641 So. 2d at 413.

181. FLA. STAT. § 39.464(1)(a) (Supp. 1994).

182. *Id.* §§ 39.4611(1)(c), 39.462.

183. 641 So. 2d 84 (Fla. 5th Dist. Ct. App. 1993), *review denied*, 649 So. 2d 233 (Fla. 1994).

184. *Id.* at 89 (citing *In re* Adoption of Doe, 543 So. 2d 741 (Fla. 1989), *cert. denied*, 493 U.S. 964 (1989)).

185. *Id.* at 89-90.

186. *Id.* at 90.

187. *Id.* at 96 (Harris, C.J., dissenting); *see* FLA. STAT. § 39.467 (1991). *See also id.* §§ 39.4611-39.4612 (Supp. 1994) (reflecting the necessity of considering the manifest best interests of the child in termination of parental rights cases).

consent provision based upon the mother's fundamental liberty interest in the care, custody, and management of her child.[188] The chief judge argued that the state should not be allowed to terminate parental rights "by barring parents from changing their minds (even after a waiver and consent is properly executed) when the change of mind occurs *before the petition for termination is even filed* and before the rights of any potential adoptive parents come into existence[.]"[189] In his view, the statute ensures quick and efficient resolution and disposal of such cases, but denying the mother the right to make a case that she is a fit and deserving mother who is able and willing to continue to care for the child "is both unfair and unreasonable."[190]

The question of who has standing to bring a termination of parental rights proceeding has been before the Florida appellate courts on a number of occasions.[191] Whether allowing a guardian ad litem to petition for termination of parental rights violates the separation of powers clause of the *Florida Constitution* was an issue considered by the Third District Court of Appeal recently in *Simms v. State*.[192] The court held in an *en banc* decision that there was no violation of the separation of powers doctrine.[193] The court ruled that the power to protect the welfare of children and terminate parental rights was not an exclusive power of one branch of government and, therefore, not subject to the separation of powers clause.[194] The court found that there was power to protect children both in the executive and in the judicial branch. The authority of the courts to protect children was inherent and, according to the appellate court, extended to the appointment of guardians ad litem for unrepresented children.[195] This authority was codified by the Florida Legislature in 1975.[196] At the same time, the legislature created HRS and charged it with the protection of dependent children.[197] Thus, the court could find no language in the *Florida Constitution* nor historical precedent confining the power to a single

188. *Henriquez*, 641 So. 2d at 98-99 (Harris, C.J., dissenting).

189. *Id.* at 99.

190. *Id.* at 101.

191. *See 1993 Leading Cases*, *supra* note 1, at 544-46; *1990 Survey*, *supra* note 1, at 1201.

192. 641 So. 2d 957 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 649 So. 2d 870 (Fla. 1994).

193. *Id.* at 962.

194. *Id.* at 961.

195. *Id.*

196. *Id.* (citing FLA. STAT. § 415.508 (1991)).

197. *Simms*, 641 So. 2d at 961.

branch of government. Rather, it found that section 39.464 provides concurrent authority in HRS, guardians ad litem, and licensed child-placing agencies to file petitions to terminate parental rights.[198] Finally, the court concluded that there are situations where the best interests of the child and HRS's interests may differ.[199] Therefore, providing authority in both branches of government furthers the State's interest in protecting children.[200]

Chief Judge Schwartz dissented, arguing that it was a violation of due process, in the context of the right to a fair trial, to permit the judiciary's appointee, in the form of a guardian ad litem, to prosecute an action to deprive a parent of the precious right to her child.[201] In his view, it is "profoundly wrong for any entity but the executive to seek and advocate the deprivation of another's rights."[202] Chief Judge Schwartz also noted that the problem may have been rectified in 1994 by the legislature's change in section 61.403,[203] which now provides that "[a] guardian ad litem when appointed shall act as next friend of the child, investigator or evaluator, *not as attorney or advocate* but shall act in the child's best interest."[204]

However, section 61.403 also provides that the guardian ad litem, acting through counsel, may file pleadings for relief as the guardian deems appropriate in furtherance of the guardian's function.[205] Thus, whether the guardian ad litem either individually or through counsel can file petitions to terminate parental rights remains open to interpretation. If Chief Judge Schwartz is correct, the child is left at the mercy of HRS to protect his or her interests for filing purposes. An alternative approach, which Florida has never followed, is to provide the right to counsel for a child in a dependency proceeding which would then allow for protection at the termination stage.[206]

Termination of the parental rights of parents who are in prison is a common issue both in the appellate courts of Florida[207] and throughout the

198. *Id.*
199. *Id.* at 962.
200. *Id.*
201. *Id.* at 963 (Schwartz, C.J., dissenting).
202. *Simms*, 641 So. 2d at 963 (Schwartz, C.J., dissenting).
203. *Id.* at 963 n.1.
204. FLA. STAT. § 61.403 (emphasis added).
205. *Id.* § 61.403(6).
206. *See Juvenile Law*, *supra* note 1, at 888; *see also* MARK I. SOLER ET AL., REPRESENTING THE CHILD CLIENT 4-52 to 4-55 (Matthew Bender, 1994).
207. *See, e.g.*, *In re* E.F., 639 So. 2d 639 (Fla. 2d Dist. Ct. App. 1994); *In re* C.M., 632 So. 2d 1093 (Fla. 1st Dist. Ct. App. 1994).

country.[208] In *re G.R.S.*,[209] a natural father appealed from an order terminating parental rights for abandonment and failure to comply with a performance agreement. The father had consented to dependency of the child and entered into a performance agreement with the goal of reunification.[210] At the time, the father was in prison. The agreement obligated him to comply with rules of the prison, participate in drug programs and parenting classes, obtain adequate housing upon release, obtain a psychological evaluation and, if necessary, therapy, and maintain biweekly contact with HRS.[211] The appellate court overturned the trial court's fact-finding, concluding that "[t]he record reflect[ed] that [the father] substantially performed all of the tasks that were offered in prison, but could not perform certain tasks because they were not available to him."[212] Furthermore, the trial record was "devoid of any evidence of reasonable efforts by HRS to reunify the family, communicate with the father or offer the father meaningful assistance in completing any of the tasks required by the performance agreement."[213] In fact, it was unrefuted that the father's correspondence to HRS about his son and the case went unanswered.[214] The court also rejected a claim of abandonment as grounds for termination, finding that the relationship between the father and the natural grandparents with whom the child resided "was strained at best."[215] The father wrote to the child and only stopped correspondence because he received no return correspondence from the grandparents. Additionally, they would not accept his collect calls. The order of termination was reversed and the case was remanded to provide time to the father to substantially comply with the performance agreement.[216]

D. *Government Agency Tort Liability*

In a significant decision rendered in the summer of 1995, the Supreme Court of Florida was asked to decide the question of whether an adjudicated dependent juvenile may maintain an ordinary negligence claim against HRS for the latter's alleged failure to provide the juvenile with services. In

208. SOLER, *supra* note 206, at 4-118.
209. 647 So. 2d 1025 (Fla. 4th Dist. Ct. App. 1994).
210. *Id.* at 1026.
211. *Id.* at 1026-27.
212. *Id.* at 1027.
213. *Id.*
214. *G.R.S.*, 647 So. 2d at 1027.
215. *Id.*
216. *Id.* at 1028.

Department of Health and Rehabilitative Services v. B.J.M.,[217] the Supreme Court of Florida, in an opinion by Justice Anstead, answered the certified question in the negative. The case began when an adjudicated dependent and delinquent minor, through its guardian ad litem, Legal Services of Greater Miami, filed a mandamus action against HRS seeking to compel the agency to place the child in a specific rehabilitative program. Subsequently, the child amended his complaint to include a tort claim for general damages based on negligence. Specifically, the child claimed that HRS breached its duty to the child by not following recommended psychiatric placement reports, failing to provide proper counsel, failing to provide vocational training or educational services comparable to those provided in non-residential settings, failing to generally meet the child's emotional, developmental and placement needs, and by inappropriately labeling the child. In response, HRS moved for summary judgment. The trial court granted the motion. The Third District Court of Appeal reversed and certified the question to the supreme court.[218]

After disposing of several procedural issues, including collateral estoppel, the supreme court addressed the question of sovereign immunity.[219] The court surveyed the historical analysis of sovereign immunity by the Florida courts. It held that the parameters of governmental tort liability are premised upon finding governmental activity in one of four categories: 1) legislative, permitting, licensing and executive officer functions; 2) enforcement of laws and the protection of public safety; 3) capital improvement and property control operations; and 4) professional, educational, and general services for the health and welfare of the citizens.[220] The court explained that assuming a government action or function is not protected under the first two categories, the court must determine whether conduct within categories three or four amounts to a "'discretionary planning or judgmental function'" as opposed to conduct which is purely operational.[221] If the challenged action is policy making, planning, or judgmental activity, it is immune from tort liability. In other words, the question is whether the function is policy making, planning, or judgmental as opposed to routine operational level actions that are subject to tort liability. The court cited *Department of Health and Rehabilitative Services v. Whaley*[222]

217. 656 So. 2d 906 (Fla. 1995).
218. *Id.* at 909.
219. *Id.*
220. *Id.* at 911.
221. *Id.* at 912.
222. 574 So. 2d 100 (Fla. 1991).

for the proposition that operational level decisions expose a child to a specific danger, such as physical placement of a child in a specific room in an HRS detention center known to HRS to be occupied by dangerous juveniles.[223] The court also cited *Department of Health and Rehabilitative Services v. Yamuni*,[224] to address the danger of negligently failing to adequately protect the child from further physical abuse at the operational level.[225] Relying upon cases rejecting theories of educational neglect, the court held that both placement decisions and decisions as to the provisions of services are planning level activities and not operational ones.[226] Thus, the court concluded that decisions on how to properly plan for a dependent child or rehabilitate a delinquent juvenile and to assess the need for counseling, education, and vocational training are discretionary judgmental decisions to be made pursuant to the broad discretion vested in HRS by the legislature.[227] For these actions HRS is immune.

Finally, the court held that its conclusion that the failure to provide certain services to the child was shielded by sovereign immunity, was also supported by *Florida Statutes* § 39.455.[228] That statute immunizes social workers who are carrying out a placement plan for dependent children. The court noted that the law does create a duty on the part of HRS and its agents and employees not to act with wanton or willful disregard of the interest of the child. Thus, a claim based on willful and wanton conduct is actionable.[229] *B.J.M.* therefore holds that immunity protects HRS from tort liability for judgmental decisions relating to the care of dependent and delinquent children. HRS may only be sued for operational level acts of negligence.

E. *Legislation*

This year the legislature expanded HRS's duty to report certain findings to law enforcement during child abuse and neglect investigations, including when HRS is aware that the family is likely to flee and when the immediate safety or welfare of the child is in danger.[230] HRS must now make an

223. *B.J.M.*, 656 So. 2d at 913 (citing *Whaley*, 574 So. 2d at 101).
224. 529 So. 2d 258 (Fla. 1988).
225. *B.J.M.*, 656 So. 2d at 913 (citing *Yamuni*, 529 So. 2d at 260).
226. *Id.*
227. *Id.* at 916.
228. *Id.* at 917.
229. *Id.*
230. *See* ch. 95-228, § 3, 1995 Fla. Sess. Law Serv. 1556, 1560 (West) (to be codified at FLA. STAT. § 415.505).

immediate report to law enforcement agencies, whereas previously, the agency had up to three days before transmitting the report to law enforcement.[231] Also, the law which mandated certain persons with defined legal duties to report abuse or neglect to HRS now extends to reporting an abandoned child.[232]

Previously, HRS could only take away an alleged dependant child upon reasonable grounds that the child was abused, neglected, abandoned, suffering from an injury, or in immediate danger.[233] The legislature has eased this burden. Now, HRS can justify taking an alleged dependant child merely upon probable cause to support a finding of reasonable grounds for the child's removal.[234] Further, the grounds for child removal now include a lack of immediate adult supervision or care, in addition to the situation where the child's custodian materially violates a condition of court imposed placement (if the child was court placed).[235] Once the child is taken into custody by HRS, an emergency shelter hearing must take place within twenty-four hours of the child's removal.[236] During the pendency of that hearing, relatives of the child will have priority consideration over custody of the child as opposed to nonrelative placement.[237]

In adjudicatory hearings, the court must now possess independent corroborative evidence of the dependency when the proceeding is based solely on an anonymous report.[238] In the past, courts, on the basis of stare decisis, protected indigent parents or guardians of the child by requiring counsel for them during a dependency action when the dependency could form the basis for a subsequent termination of parental rights.[239] Florida law has been amended to comply with the prior case law and mandates that indigent parents be appointed counsel in dependency actions when threa-

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231. *Id.*

232. *See id.* § 44, 1995 Fla. Sess. Law Serv. at 1611-12 (amending FLA. STAT. § 415.504).

233. *See* FLA. STAT. § 39.401.

234. Ch. 95-228, § 6, 1995 Fla. Sess. Law Serv. at 1561-62 (amending FLA. STAT. § 39.401(1), (6)); *see also id.* § 7, 1995 Fla. Sess. Law Serv. at 1562-64 (to be codified at FLA. STAT. § 39.402).

235. *Id.* § 6, 1995 Fla. Sess. Law Serv. at 1561-62 (to be codified at FLA. STAT. § 39.401(b) (1993)).

236. *Id.*

237. *Id.*

238. Ch. 95-228, § 12, 1995 Fla. Sess. Law Serv. at 1568 (to be codified at FLA. STAT. § 39.408).

239. *In re* D.B., 385 So. 2d 83 (Fla. 1980); *In re* D.F., 622 So. 2d 1102 (Fla. 1st Dist. Ct. App. 1993); FLA. R. JUV. P. 8.320.

tened with permanent loss of the child or when criminal charges underlie the dependency petition.[240]

The legislature has expressed its intent to encourage relatives to care for a child who is taken into foster care custody.[241] Further, the legislature expressed its preference that adoptive placements take place as expeditiously as possible after a termination of parental rights in order to avoid temporary placements.[242] Long-term foster care placements are not generally considered a permanent option, but may be considered a permanent option when all the following conditions are met: the child is fourteen years or older; the child lives in a licensed foster home and the foster parents and child desire to live together on a permanent basis but do not wish to adopt; the foster parents are committed to providing care to the child until age of majority; the child has lived with foster parents for at least twelve months; the foster parents and child view each other as family; and the child's well-being is being promoted by the living arrangements.[243] Long-term placements, however, are not permanent, and are subject to court revocation when a material change in circumstances exists, which makes it no longer in the child's best interest to remain in the particular foster home.[244]

IV. FAMILIES IN NEED OF SERVICES AND CHILDREN IN NEED OF SERVICES

As prior surveys have indicated, there is very little case law interpreting the part of the 1987 juvenile code covering families and children in need of services.[245] However, one aspect of the Families in Need of Services and Children in Need of Services ("FINS/CINS") statute that has generated discussion is the proposition that a child who violates a CINS order may be held in contempt of court and then have his or her liberty removed by placement in secure detention.[246] The ability of the court to punish a

240. Ch. 95-228, § 5, 1995 Fla. Sess. Law Serv. at 1561 (amending FLA. STAT. § 39.40 (1993)).

241. *See id.* § 13, 1995 Fla. Sess. Law Serv. at 1568-69 (amending FLA. STAT. § 39.45 (Supp. 1994)).

242. *Id.* § 14, 1995 Fla. Sess. Law Serv. at 1569 (amending FLA. STAT. § 39.47 (Supp. 1994)).

243. *Id.* § 62, 1995 Fla. Sess. Law Serv. at 1635 (to be codified at FLA. STAT. § 39.41(2)(a)6.c.(I)-(V)).

244. *Id.* § 62, 1995 Fla. Sess. Law Serv. at 1635 (to be codified at FLA. STAT. § 39.41(2)(a)6.d.).

245. *See 1992 Survey, supra* note 1, at 383-84.

246. FLA. STAT. § 39.444 (Supp. 1994).

status offender by use of secure detention is not just an issue in Florida. The Federal Juvenile Justice and Delinquency Prevention Act also provides for the enforcement of valid court orders in status offender cases by contempt and punishment and ultimately incarceration.[247]

Indeed, the issue of punishment of children for violation of CINS orders was recently before the Fifth District Court of Appeal in *Department of Juvenile Justice v. S.W.*[248] The Department of Juvenile Justice filed a petition for certiorari on behalf of two children who had been adjudicated children in need of supervision and who were ordered by the trial court to complete certain educational requirements, although the appellate court noted that the record was quite unclear on exactly what was ordered.[249] Four months after the initial order, the trial court issued an "Order to Show Just Cause" to the two children to show why they should not be held in indirect criminal contempt for failure to comply with the court's school orders.[250] The children appeared, waived counsel, and pled guilty to contempt of court. They were adjudicated delinquent, placed in non-secure detention and, after a disposition hearing, placed at restrictiveness level two, and ordered to pay costs, restitution, and comply with other special provisions.[251] All of this was done in clear contravention of the Supreme Court of Florida's 1992 opinion in *A.A. v. Rolle*,[252] which held that the court may not adjudicate children delinquent and in contempt for violation of the CINS order and place them in detention as punishment. The *S.W.* court recognized this and granted the petition for certiorari.[253] In fact, current Florida law now provides for the secure detention for direct or indirect criminal contempt for violation of the CINS order.[254] The legislature responded to the *A.A.* decision by amending the juvenile code to allow for secure detention of CINS for five to fifteen days in a staff secure shelter or residential facility.[255]

Some minor statutory changes were made by the legislature concerning status offenses. Students expelled from school are not guaranteed continu-

247. 42 U.S.C. §§ 5601-5785 (1988 & Supp. V 1993).
248. 647 So. 2d 1055 (Fla. 5th Dist. Ct. App. 1994).
249. *Id.* at 1056 n.1.
250. *Id.* at 1056.
251. *Id.*
252. 604 So. 2d 813 (Fla. 1992).
253. *S.W.*, 647 So. 2d at 1056.
254. *See* FLA. STAT. § 39.0145 (1993).
255. *Id.* § 39.0145(2)(b).

ing educational services.[256] Nonetheless, district school systems may set up alternative site schools for disruptive or violent youths.[257] The alternative site schools are generally referred to as second chance schools.[258] Students assigned to second chance schools must either be: habitually disruptive, interfere with their own or other's learning, or commit a serious offense which would normally warrant suspension or expulsion.[259] If one of these criteria exists, the school's local child study team will evaluate the child to determine if placement into the second chance school is necessary.[260] The school boards should take into account the student's safety, the school's ability to control the student, the appropriate educational program in which to place the student, and how to maintain an educational learning environment.[261]

V. CONCLUSION

The legislature had taken a hiatus from its prior efforts to respond to public pressure involving the juvenile justice and child welfare systems. The appellate courts have been diligent in hearing significant trial issues and holding the trial courts accountable for compliance with the juvenile code. It would be desirable for the legislature to allow the current juvenile code to remain in effect so that all participants in the juvenile justice and child welfare system have an opportunity to familiarize themselves with the law and employ it over time. It is hard to evaluate the effectiveness of the juvenile code when the legislature changes it in response to every change in the political wind.

256. Ch. 95-267, § 63, 1995 Fla. Sess. Law Serv. at 1877 (amending FLA. STAT. § 228.041 (Supp. 1994)).

257. *See id.* § 64, 1995 Fla. Sess. Law Serv. at 1877-78 (amending FLA. STAT. § 230.02 (1993)).

258. *See id.* § 67, 1995 Fla. Sess. Law Serv. at 1880-81 (to be codified at FLA. STAT. § 230.2316).

259. *Id.*

260. *Id.*

261. *See* ch. 95-267, § 65, 1995 Fla. Sess. Law Serv. at 1878 (to be codified at FLA. STAT. § 230.22).

Professional Responsibility Law in Florida: The Year in Review, 1995

Timothy P. Chinaris*

TABLE OF CONTENTS

I. INTRODUCTION

The past year[1] saw a number of interesting and innovative developments in Florida's professional responsibility jurisprudence. This article reviews significant Florida court decisions, ethics rules, and advisory ethics opinions handed down during the year that are likely to affect Florida lawyers as they attempt to represent their clients zealously while complying with the letter, if not always the spirit, of the *Florida Rules of Professional Conduct* ("RPC").[2]

Today's lawyer may act in many different capacities, at times assuming the role of advocate, advisor, counselor, fiduciary, intermediary, businessperson, or marketer. The lawyer must adhere to a host of sometimes-

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1. This article surveys professional responsibility developments in Florida from July 15, 1994, through July 14, 1995.

2. The RPC are found in Chapter 4, *Rules Regulating The Florida Bar.* Although the bulk of this article focuses on decisions concerning the RPC, it does mention an important addition to Chapter 3, "Rules of Discipline," in the *Rules Regulating The Florida Bar. See infra* notes 196-98 and accompanying text.

overlapping ethical obligations while operating within the framework of these varied relationships. Using a functional approach, this article analyzes effects that the cited authorities may have upon a lawyer's ethical duties in several key relationships. After this introduction, Part II begins by looking at some professional responsibility developments that can affect the lawyer-client relationship. Specific areas reviewed include client identity, communication with clients, business transactions with clients, and fees. Next, Part III focuses on a lawyer's role as an officer of the justice system and his or her relationships with, and duties to, that system. Part IV then examines ethical duties attendant to a lawyer's relationships with various third parties: prospective clients; opponents; other lawyers; and partners, employers, and employees. Finally, Part V covers developments relevant to the lawyer's relationship with the Supreme Court of Florida, The Florida Bar, and Florida's lawyer disciplinary system, and reviews some significant disciplinary cases handed down in the past year.[3]

II. PROFESSIONAL RESPONSIBILITY AND THE LAWYER-CLIENT RELATIONSHIP

Most observers would agree that, of the many professional relationships in which a lawyer may be engaged, the relationship between client and lawyer remains paramount. In 1995 a number of cases, rules, and ethics opinions addressed aspects of this most important relationship. Before a lawyer can determine the substantive duties owed to a client by virtue of the lawyer-client relationship, the lawyer must first be certain that he or she has accurately identified the client. While one might assume that it is unnecessary to even address this basic point, a surprising number of callers to the Florida Bar's "ethics hotline"[4] present scenarios that boil down to this essential question: "Who is my client?" Echoing this theme, several 1995 court decisions revolved around client identity issues.

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3. Key disciplinary cases are analyzed where appropriate in other sections of the article, but the remainder are collected in Part V for the convenience of the reader.

4. Since 1985, the Ethics Department of the Florida Bar has operated a toll-free telephone "hotline" for bar members. A Florida lawyer may call the Bar's Tallahassee office at 1-800-235-8619 and obtain an informal oral advisory opinion concerning the calling lawyer's own contemplated conduct. In 1995, Ethics Department lawyers answered about 17,000 calls. Timothy P. Chinaris (1995) (unpublished statistics on file with author, Tallahassee, Florida). Rules governing the advisory opinion process are found in *Florida Bar Procedures for Ruling on Questions of Ethics*, FLA. B.J., Sept. 1994, at 652-53. During his tenure with the Bar, the author has talked to hundreds of lawyers facing client identity dilemmas.

Brennan v. Ruffner[5] concerned a legal malpractice suit brought by Dr. Brennan, a disgruntled minority shareholder of a closely held corporation, against lawyer Ruffner. Brennan had practiced in a three-doctor medical group operated as a professional service corporation. Ruffner had prepared the shareholder's agreement. Several years later, Brennan was ousted from the corporation by the other two shareholders. In suing the others for breach of contract and fraud, Brennan alleged that he had not been represented by counsel in negotiating the shareholder's agreement. After settling that suit, however, Brennan then sued Ruffner for legal malpractice, alleging that Ruffner had represented both him individually and the corporation.

Ruffner defended by denying the existence of a lawyer-client relationship with Brennan.[6] The undisputed facts showed that Ruffner had represented the corporation and that there had been no privity of contract between Brennan and Ruffner.[7] Nevertheless, Brennan argued that Ruffner owed a duty to him as a shareholder by virtue of Ruffner's representation of the closely held corporation. Rejecting this contention, the court stated:

> [W]e hold that where an attorney represents a closely held corporation, the attorney is not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder absent special circumstances or an agreement to also represent the shareholder individually. . . . [A]n attorney representing a corporation does not become the attorney for the individual stockholders merely because the attorney's actions on behalf of the corporation may also benefit the stockholders.[8]

It may be noted that, although RPC 4-1.13(a)[9] expresses the client

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5. 640 So. 2d 143 (Fla. 4th Dist. Ct. App. 1994).

6. The three elements to a legal malpractice action in Florida are: the lawyer's employment; the lawyer's neglect of a reasonable duty; and that the lawyer's breach of that duty was the proximate cause of damages suffered by the plaintiff. Riccio v. Stein, 559 So. 2d 1207 (Fla. 3d Dist. Ct. App.), *review dismissed*, 567 So. 2d 436 (Fla. 1990).

7. *Brennan*, 640 So. 2d at 145.

8. *Id.* at 145-46.

9. RPC 4-1.13, "Organization as Client," provides in pertinent part:

> (a) Representation of Organization. A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> . . . .
>
> (d) Identification of Client. In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall

identity principle actually applied in the case, the court did not cite this rule in reaching its decision. Under RPC 4-1.13(a), the client of a lawyer who represents an organization is deemed to be the entity rather than the entity's individual constituents (e.g., officers, directors, shareholders).

Client identity was also determinative in the disciplinary case of *Florida Bar v. Nesmith*.[10] In *Nesmith*, a lawyer borrowed money from the owner of a corporation that the lawyer was representing. The lawyer did not comply with the provisions of RPC 4-1.8(a),[11] which govern lawyer-client business transactions. The supreme court, however, found the lawyer not guilty of unethical conduct because the loan was entered into by the owner in his individual capacity.[12] Without citing RPC 4-1.13, the court appeared to strictly apply the rule's basic principle (i.e., that the lawyer represents the entity rather than its individual constituents). Some courts in other jurisdictions have been reluctant to automatically apply the general rule of RPC 4-1.13(a) in representations involving closely held corporations.[13]

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explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) Representing Directors, Officers, Employees, Members, Shareholders, or Other Constituents of Organization. A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 4-1.7. If the organization's consent to the dual representation is required by rule 4-1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

R. REGULATING FLA. BAR 4-1.13.

10. 642 So. 2d 1357 (Fla. 1994).

11. Subdivision (a) of RPC 4-1.8, "Conflict of Interest; Prohibited Transactions," provides:

(a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

R. REGULATING FLA. BAR 4-1.8(a).

12. *Nesmith*, 642 So. 2d at 1359.

13. *See, e.g.*, Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987); *In re* Brownstein, 602 P.2d 655, 657 (Or. 1979); *In re* Banks, 584 P.2d 284, 289-90 (Or. 1978);

These courts instead have examined the underlying circumstances, including the reasonable expectations of the entity's constituents regarding the existence of a lawyer-client relationship. In *Nesmith*, the Supreme Court of Florida did not adopt this more expansive approach to client identity in representations involving closely held corporations.

RPC 4-1.13(a) was directly addressed and applied, however, by the United States District Court for the Middle District of Florida in *Hilton v. Barnett Banks, Inc.*[14] In *Hilton*, a Florida law firm represented one Barnett entity ("Barnett Pinellas") in one matter, then sued the Barnett holding company (Barnett Pinellas' parent) and some of the holding company's other subsidiaries in an unrelated matter. Responding to a motion to disqualify, the firm asserted that, under RPC 4-1.13, the defendants were not its "clients." The court agreed with the firm's RPC 4-1.13 analysis, but disqualified the firm due to conflict of interest reasons because the firm's pleadings sought relief against the holding company's affiliated banks and other subsidiaries (which, of course, included Barnett Pinellas).[15]

After identifying one's client, a lawyer must be mindful that it is the client, rather than the lawyer, who sets the ultimate objectives of the representation. The disciplinary case of *Florida Bar v. Glant*[16] underscored this precept, which is codified in RPC 4-1.2(a).[17] In *Glant*, the supreme court reprimanded a lawyer who, without the client's authority or knowledge, filed a motion requesting that the client be given custody of four children when the client wanted custody of only two of the children, and wrote to a state agency and the governor requesting that the case be investigated.[18]

Margulies v. Upchurch, 696 P.2d 1195, 1200-01 (Utah 1985).

14. No. 94-1036CIV-T24(A), 1994 WL 776971, (M.D. Fla. Dec. 30, 1994).

15. *Id.* at *3-4.

16. 645 So. 2d 962 (Fla. 1994).

17. Subdivision (a) of RPC 4-1.2, "Scope of Representation," provides:

> (a) Lawyer to Abide by Client's Decisions. A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to subdivisions (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

R. REGULATING FLA. BAR 4-1.2(a).

18. *Glant*, 645 So. 2d at 965.

Communication is a primary aspect of the lawyer-client relationship, as recognized in RPC 4-1.4.[19] The crucial importance of unfettered lawyer-client communication, however, was not properly acknowledged by the court in *Taylor v. Searcy, Denney, Scarola, Barnhart & Shipley, P.A.*[20] In *Searcy*, a lawyer left a law firm, and some clients who had substantial contingent fee cases wished to follow him. The lawyer and the firm wrestled over several attractive cases, and a trial court granted the firm's motion to enjoin the lawyer from "communicating with persons alleged to be clients of the firm."[21] After the lawyer engaged in some prohibited communication, the trial court found him guilty of civil contempt and fined him $1,700,000 for violating the injunction.[22]

The Fourth District Court of Appeal reversed and remanded, setting aside the finding of contempt and the fine on a procedural ground.[23] The court went on to emphasize that the $1,700,000 fine was excessive. Citing to two disciplinary cases,[24] the majority viewed the large fine as a penalty that could preclude the client from effectively exercising her right to choose her own counsel.[25] Such a penalty would clearly violate public policy in Florida.[26] Senior Judge Mager, concurring in part and dissenting in part, was quite disturbed that the majority failed to decide the case based on the injunction's detrimental impact on "the fundamental first amendment right of an individual to *communicate* with the attorney of that individual's choice, whether it be for the purposes of retention, continued representation,

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19. RPC 4-1.4, "Communication," provides:

(a) Informing Client of Status of Representation. A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

R. REGULATING FLA. BAR 4-1.4.

20. 651 So. 2d 97 (Fla. 4th Dist. Ct. App. 1994).

21. *Id.* at 100.

22. *Id.* at 98.

23. *Id.* at 99. The appeals court noted that the contempt hearing had been held after a motion to substitute the lawyer for the firm in the case had been granted. Consequently, at that point "the injunction was no longer effective and thus the purpose of the motion could only have been punitive . . . ." *Id.* at 98. The trial court therefore should have treated the matter as one of indirect criminal contempt, rather than civil contempt.

24. Florida Bar v. Hollander, 607 So. 2d 412 (Fla. 1992); Florida Bar v. Doe, 550 So. 2d 1111 (Fla. 1989).

25. *Searcy*, 651 So. 2d at 99.

26. *Id.*

or termination."[27] He insisted that an injunction purporting to bar communications of the type at issue in the case was simply beyond the power and authority of the court.[28]

In 1995, the Florida Bar Professional Ethics Committee also ventured into the area of lawyer-client communication in the context of lawyers leaving firms. At issue in Florida Ethics Opinion 93-4[29] was the ethical propriety of an employment agreement between a law firm and one of its associates. The employment agreement prohibited the departing associate from "seeking, directly or indirectly, any of the [firm]'s clients." The committee decided, and the Bar's Board of Governors agreed, that this prohibition on "indirect" solicitation would be unethical if it could be read to limit a lawyer's duty, imposed by RPC 4-1.4,[30] to notify clients of the lawyer's departure from the firm.[31]

The client-lawyer relationship is a fiduciary one of trust and confidence, and for this reason lawyers must follow special rules when they undertake to transact business with their clients. The ethical standards applicable in this area are set forth in RPC 4-1.8(a).[32] In *Florida Bar v. Reed*,[33] the supreme court reprimanded a lawyer who became embroiled in a real estate transaction gone awry and did not follow RPC 4-1.8(a). The lawyer acted as the buyers' lawyer and realtor, represented the sellers to a limited extent, acted as closing agent, and served as escrow agent. Problems arose, including bounced checks and trust accounting problems. The court imposed a six-month suspension, frowning on the lawyer's multiple representation and failure to follow the business transaction rule.[34]

Even absent evidence of client harm, failure to follow RPC 4-1.8(a) when transacting business dealings with clients can result in discipline. In

27. *Searcy*, 651 So. 2d at 103 (Mager, S.J., concurring in part and dissenting in part).

28. *Id.* at 106.

29. FLA. B. NEWS, Mar. 1, 1995, at 21. *See infra* notes 131-34 and accompanying text.

30. *See supra* note 19.

31. FLA. B. NEWS, Mar. 1, 1995, at 21.

32. *See supra* note 11. Florida case law also imposes requirements upon lawyer-client business transactions. *See, e.g.*, Jordan v. Growney, 416 So. 2d 24, 25 (Fla. 4th Dist. Ct. App. 1982) (noting that "an attorney who self-deals with a client must demonstrate that the transaction was as beneficial to the client as if conducted at arm's length between strangers"); Abstract & Title Corp. of Fla. v. Cochran, 414 So. 2d 284, 285 (Fla. 4th Dist. Ct. App. 1982) (noting that, when challenged, the burden is on the lawyer to show, by clear and convincing evidence, the fairness of the transaction).

33. 644 So. 2d 1355 (Fla. 1994).

34. *Id.* at 1358.

Florida Bar v. Rue,[35] a lawyer was found guilty of selling automobiles to clients without the written disclosures and consents required by the rule.[36]

A related issue concerns a lawyer's provision of financial assistance to clients during the course of representation. Traditionally, the rules of ethics, as well as the legal doctrines of champerty and maintenance, have permitted lawyers to assist clients financially only by advancing costs or expenses of the litigation itself; payment of, or even advancement of, non-litigation expenses has been strictly prohibited. This standard is expressed today in RPC 4-1.8(e).[37] The supreme court, however, in the disciplinary case of *Florida Bar v. Taylor*,[38] appears to have carved out a limited "humanitarian" exception to this time-honored prohibition. In this case, the lawyer and his firm provided an apparently needy client with some used clothing and a $200 check, drawn on the firm's account, for basic necessities. The referee[39] assigned to the disciplinary case found the lawyer not guilty of violating RPC 4-1.8(e), and the supreme court accepted this finding.[40] The court emphasized that this financial assistance was "essentially an act of humanitarianism," was not given to induce the client to hire the lawyer or continue the representation, and that there was no "expectation of repayment" on the part of the lawyer.[41]

Although the court was placed in a very difficult position because of the facts involved, *Taylor* seems to be based on unrealistic assumptions and presents a strained application of the ethics rules. First, once a humanitarianism exception to RPC 4-1.8(e) has been recognized, it will inexorably expand. If $200 was a permissible gift, how about $500, or $1000? Furthermore, the *Taylor* court stressed that the gifts in question were not

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35. 643 So. 2d 1080 (Fla. 1994).

36. *Id.* at 1081-82.

37. Subdivision (e) of RPC 4-1.8, "Conflict of Interest; Prohibited Transactions," provides:

> (e) Financial Assistance to Client. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
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> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

R. REGULATING FLA. BAR 4-1.8(e).

38. 648 So. 2d 1190 (Fla. 1994).

39. The Supreme Court of Florida appoints a county or circuit judge to sit as "referee" in the trial of disciplinary cases. R. REGULATING FLA. BAR 3-7.6(a).

40. *Taylor*, 648 So. 2d at 1191-92.

41. *Id.* at 1192.

made for the purpose of establishing or maintaining the lawyer's employment.[42] Perhaps that was true for the initial payment, but human nature teaches that a client who has received one such gift may expect more. At the very least, the recipient is likely to tell others of her good fortune and thus create expectations in the minds of those potential clients—expectations that, to those persons, may act as an inducement to hire that lawyer. Finally, there is no basis in RPC 4-1.8(e) for carving out a "humanitarian" exception. A more forthright, and easier approach to apply would be to change the rule to spell out the precise boundaries of the exception. Overlooking the plain language of the rule merely breeds disrespect for this and other rules.

While the court did not apply RPC 4-1.8(e) to bar the gift in *Taylor*, it is clear that *advances* of living expenses are still considered unethical. In *Florida Bar v. Rue*,[43] a lawyer received a ninety-one day suspension for this and other misconduct.[44]

In the lawyer-client relationship, few areas are of greater interest to both sides than the matter of fees. The supreme court resolved a conflict among district courts of appeal by announcing the proper standard to be used for determining the quantum meruit recovery of a lawyer discharged without cause prior to resolution of a client's contingent fee case. In *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*,[45] the court held that the "lodestar" method[46] of calculating fees should not be applied in this context.[47] The "lodestar" method is to be used in cases where the fee will be paid by someone other than the client who received the services. This method is deficient for determining the quantum meruit award to be paid to the discharged lawyer by the client (or contracting party) because, in contravention of *Rosenberg v. Levin*,[48] it does not allow for consideration of "the totality of the circumstances."[49] All relevant factors, including

42. *Id.*

43. 643 So. 2d at 1080.

44. *Id.* at 1083. The lawyer was found guilty of: "sharing fees with non-lawyers; providing [improper] financial assistance to clients; engaging in business transactions with clients without the required disclosures; and seeking and collecting prohibited fees." *Id.* at 1082.

45. 652 So. 2d 366 (Fla. 1995).

46. *See* Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), *as modified by* Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990).

47. *Poletz*, 652 So. 2d at 368.

48. 409 So. 2d 1016 (Fla. 1982).

49. *See id.* at 1022.

those set forth in RPC 4-1.5(b),[50] must be considered by the court in fixing the actual value of the services rendered to the client. The supreme court identified the following as examples of additional factors that could be considered by the trial court in the exercise of its sound discretion: "the fee [agreement] itself, the reason the attorney was discharged, actions taken by the lawyer or client before or after discharge, and the benefit actually conferred on the client."[51] In a footnote, the supreme court expressly recognized that the refusal of a discharged lawyer or law firm to make its file available to successor counsel could affect the valuation of the discharged lawyer's services.[52] *Poletz* is significant because it sends a message to trial courts that a quantum meruit determination should be based on the totality of the relevant circumstances in each case, not simply a mechanistic application of an hours-based formula.

In the disciplinary arena, the court in *Rue*[53] reiterated its position, earlier expressed in cases such as *Florida Bar v. Gentry*,[54] that the rule

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50. Subdivision (b) of RPC 4-1.5, "Fees for Legal Services," provides:

(b) Factors to Be Considered in Determining Reasonable Fee. Factors to be considered as guides in determining a reasonable fee include:

(1) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;

(4) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;

(5) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and

(8) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

R. REGULATING FLA. BAR 4-1.5(b).

51. *Poletz*, 652 So. 2d at 369.

52. *Id.* at 369 n.5.

53. *See* text accompanying notes 35, 43-44.

54. 475 So. 2d 678, 679 (Fla. 1985).

against excessive fees[55] will be strictly applied when lawyers charge for recovery of personal injury protection ("PIP") benefits in accident cases.

Applicability of the lawyer-client confidentiality rule[56] to lawyers' trust accounting records was again recognized by the Professional Ethics Committee in Florida Ethics Opinion 93-5.[57] Consistent with its prior

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55. Subdivision (a) of RPC 4-1.5, "Fees for Legal Services," provides:

(a) Illegal, Prohibited, or Clearly Excessive Fees. An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee is clearly excessive when:

(1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or

(2) the fee is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.

R. REGULATING FLA. BAR 4-1.5(a).

56. RPC 4-1.6, "Confidentiality of Information," provides:

(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.

(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with the Rules of Professional Conduct.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

Id. 4-1.6.

57. FLA. B. NEWS, Oct. 1, 1994, at 40.

opinions,[58] the committee concluded that a lawyer "who is an agent for a title insurance company may not permit the title insurer to audit the attorney's general trust account without consent of the affected clients."[59] The opinion went on to state, however, that the "attorney . . . need not obtain client consent before permitting the insurer to audit a special trust account used exclusively for transactions in which the attorney acts as the title or real estate settlement agent."[60] Authorization for permitting access to the records of this special trust account was found in subdivision (c)(1) of RPC 4-1.6, which allows a lawyer to disclose confidential information "to serve the client's interest unless it is information the client specifically requires not to be disclosed."[61]

Finally, *Florida Bar v. Niles*[62] underscored the importance of trust in the lawyer-client relationship. There, a lawyer represented a defendant in a high-profile murder case. The lawyer, unbeknownst to the client, was paid $5000 by a television program to arrange for a videotaped interview with the incarcerated client. The lawyer used deception to secure admittance of himself and the camera crew to the prison. An incriminating interview was obtained—and broadcast—without the client's authorization. The supreme court reluctantly accepted the referee's recommendation that the lawyer be suspended for just one year, but stated that its decision "is not to be read as an indication that similar conduct will receive any discipline less than disbarment."[63]

III. PROFESSIONAL RESPONSIBILITY IN THE TRIAL SETTING

A lawyer's duty to zealously represent clients is not unrestrained. A lawyer is an officer of the court, and this relationship of the lawyer to the justice system imposes certain obligations and constraints upon the lawyer's advocacy, particularly in the trial setting. Perhaps the paramount duty owed to the justice system is that of candor toward the tribunal. False or misleading statements by a lawyer to a court undermine the integrity of the entire legal system and are dealt with harshly when discovered. For example, in *Florida Bar v. Kleinfeld*,[64] a forum-shopping lawyer was suspended for three years and placed on probation for another two years as

58. *See* Fla. Ethics Op. 72-3; *see also* Fla. Ethics Op. 77-25, 62-24.
59. Fla. Ethics Op. 93-5, FLA. B. NEWS, Oct. 1, 1994, at 40.
60. *Id.*
61. *Id.*
62. 644 So. 2d 504 (Fla. 1994).
63. *Id.* at 507.
64. 648 So. 2d 698 (Fla. 1994).

a result of falsely alleging in a sworn motion to disqualify a judge that the judge had threatened and attempted to intimidate her counsel.[65]

Motions to disqualify lawyers from representing their clients at trial remained popular in 1995. On a procedural note, in *Arthur v. Gibson*[66] the Fifth District Court of Appeal made it clear that a trial court must conduct a hearing before ruling on such a motion.[67]

Turning to the substantive issues, most of the reported lawyer disqualification cases were filed in connection with the "lawyer-as-witness rule," RPC 4-3.7.[68] In *Swensen's Ice Cream Co. v. Voto, Inc.*,[69] the appellate court quashed a trial court's order disqualifying a lawyer and his firm from representing their client, Swensen's.[70] The lawyer had been hired by Swensen's in a prior matter to help an assignee of a Swensen's franchise in a dispute with the assignor. The lawyer wrote two letters stating that the assignor had breached the franchise agreement. In the present case, the lawyer and his firm represented Swensen's in a separate matter in which Swensen's was adverse to the assignee. The assignee moved to disqualify the lawyer and his firm, alleging that the lawyer would be called as a witness due to his involvement in the prior suit. The trial court granted the motion.

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65. *Id.* at 701.

66. 654 So. 2d 983 (Fla. 5th Dist. Ct. App. 1995).

67. *Id.* at 984.

68. RPC 4-3.7, "Lawyer as Witness," provides:

> (a) When Lawyer May Testify. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:
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> (1) the testimony relates to an uncontested issue;
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> (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
>
> (3) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (4) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) Other Members of Law Firm as Witnesses. A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule 4-1.7 or 4-1.9 [concerning conflicts of interest].

R. REGULATING FLA. BAR 4-3.7.

69. 652 So. 2d 961 (Fla. 4th Dist. Ct. App. 1995).

70. *Id.*

Reversing the order of disqualification, the Fourth District Court of Appeal carefully analyzed each element of RPC 4-3.7. Because subdivision (a) of the rule disqualified only a trial advocate who will also be a "necessary witness on behalf of" a client, the court pointed out that the lawyer "will not be testifying either against or on behalf of Swensen's."[71] The two letters (and any testimony from the lawyer concerning them) were not necessarily material to Swensen's case, nor would they prejudice it. Moreover, the court stated that any factual information possessed by the lawyer was also known to the assignee's principals with whom the lawyer had dealt. Thus, the lawyer's testimony "would be cumulative at best."[72] In short, the movant failed to show that the lawyer would be a necessary witness on his client's behalf.[73] Nor did the assignee show that the lawyer's testimony would be adverse to his client's position. Finally, citing subdivision (b) of RPC 4-1.7, the court noted that the disqualification imposed by subdivision (a) of the rule is a personal one—it can extend beyond a testifying lawyer to reach the lawyer's law firm only if the lawyer was disqualified because his or her testimony was adverse to, and thus in conflict with, the client's interests.[74]

In *City of Lauderdale Lakes v. Enterprise Leasing Co.*,[75] the Fourth District Court of Appeal again relied upon RPC 4-3.7(b) in ruling that a trial court departed from the essential requirements of law by disqualifying an entire law firm where only one lawyer in the firm was to be called as a

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71. *Id.* at 962.

72. *Id.* Florida case law and ethics opinions have long held that the "lawyer-as-witness rule" is not to be used by opposing counsel as a tactical weapon when a lawyer's testimony would be immaterial or cumulative. *See, e.g.*, Devins v. Peitzer, 622 So. 2d 558 (Fla. 3d Dist. Ct. App. 1993); Arcara v. Philip M. Warren, P.A., 574 So. 2d 325 (Fla. 4th Dist. Ct. App. 1991); Banco de Comercio v. Sun Banks, Inc., 488 So. 2d 870 (Fla. 3d Dist. Ct. App. 1986); Williams v. Wood, 475 So. 2d 289 (Fla. 5th Dist. Ct. App. 1985); Cazares v. Church of Scientology of Cal., Inc. 429 So. 2d 348 (Fla. 5th Dist. Ct. App.), *review denied*, 438 So. 2d 831 (Fla. 1983); Hill v. Douglass, 248 So. 2d 182 (Fla. 1st Dist. Ct. App. 1971), *quashed on other grounds*, 271 So. 2d 1 (Fla. 1972); *see also* Fla. Ethics Op. 74-36, 72-2, 64-39.

73. *See* Allstate Ins. Co. v. English, 588 So. 2d 294, 295 (Fla. 2d Dist. Ct. App. 1991).

74. *Swenson's*, 652 So. 2d at 962; *see In re* Estate of Gory, 570 So. 2d 1381, 1383 (Fla. 4th Dist. Ct. App. 1990). This concept of a testimonial disqualification being personal to the lawyer and not imputed to the lawyer's firm was first adopted when the RPC superseded the old *Code of Professional Responsibility* effective January 1, 1987. Under the prior *Code of Professional Responsibility*, a testimonial disqualification did extend to the testifying lawyer's firm. Calls to the Florida Bar ethics "hotline" indicate that many Florida lawyers and judges remain unaware of this substantial change in the "lawyer-as-witness rule."

75. 654 So. 2d 645 (Fla. 4th Dist. Ct. App. 1995).

witness and there was no showing that the lawyer's testimony would be adverse to the client's position.[76]

An interesting case concerning application of RPC 4-3.7 when a lawyer is a party to the suit was *Springtree Country Club Plaza, Ltd. v. Blaut.*[77] The lawyer represented his wife in a slip and fall action, and represented himself on the accompanying loss of consortium claim. Reversing the lower court's denial of a motion to disqualify the lawyer and his firm, the appellate court stated that the lawyer's position as a party in interest, as well as a party seeking damages, "could constitute a violation of Rule 4-3.7."[78] In view of the RPC 4-3.7 problem, as well as the fact that the lawyer's partner had previously formed the opponent's partnership, the trial court was directed to disqualify the lawyer and his firm from any representation in the case.[79]

Kusch v. Ballard[80] was a disqualification case concerning the difficult and controversial issue of *inadvertent disclosure* of confidential documents in litigation. A defendant's lawyer prepared a letter addressed to his client. The lawyer's secretary, however, inadvertently faxed the document to plaintiff's counsel. Plaintiff's counsel began reading the letter, realized that it had been mistakenly transmitted to him, and returned it to defense counsel. Plaintiff's counsel then sought production of the document, alleging waiver of any privilege. Defense counsel responded by moving to disqualify plaintiff's counsel. The trial court determined that the document was privileged, that the privilege had not been waived, and that, apparently on the authority of *General Accident Insurance Co. v. Borg-Warner Acceptance Corp.*,[81] lawyers for both plaintiff and defendant must be disqualified.[82] Predictably, writs for certiorari followed.[83]

The Fourth District Court of Appeal rendered its decision in a one-sentence per curiam reversal of the trial court's order.[84] What is most notable about this case is the fact that all three of the judges on the panel wrote an opinion.[85] This exemplifies the depth of disagreement over how

76. *Id.* at 646.
77. 642 So. 2d 27 (Fla. 4th Dist. Ct. App. 1994).
78. *Id.* at 28.
79. *Id.*
80. 645 So. 2d 1035 (Fla. 4th Dist. Ct. App. 1994).
81. 483 So. 2d 505 (Fla. 4th Dist. Ct. App. 1986).
82. *Kusch*, 645 So. 2d at 1038.
83. *Id.* at 1035.
84. *See id.*
85. Judge Glickstein concurred specially, Judge Farmer concurred, and Judge Stevenson concurred in part and dissented in part.

to handle the inadvertent disclosure problem,[86] which undoubtedly will be occurring more frequently due to fax machines, e-mail, and other new forms of transmitting information. The only certainty in this area is that more litigation can be expected.

One development to which trial lawyers must take heed is the trend toward strict enforcement of rules against improper jury argument. Appellate courts, particularly the Fourth District Court of Appeal, seem more inclined to handle egregious violations by reversal—sometimes even in the absence of objections.

Relying on RPC 4-3.4(e),[87] the Fourth District Court of Appeal reversed based on improper argument in *Bellsouth Human Resources v. Colatarci*.[88] The court's forceful opinion was intended to send a message to both lawyers and trial judges.[89] Arguments that violated RPC 4-3.4(e) included statements by counsel regarding "[w]hat other lawyers have done, what has occurred in other law suits, and what other corporations have done."[90]

The Fourth District Court of Appeal again reversed a case on the basis of grounds that included argument outside the bounds of RPC 4-3.4(e) in *Dutcher v. Allstate Insurance Co.*[91] Trial counsel had disparagingly commented regarding his personal opinion of chiropractors and made a

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86. The Florida Bar Professional Ethics Committee intensely debated the inadvertent disclosure issue at its meetings for over a year, but simply could not agree on the ethically proper course of conduct to be followed. Finally the committee issued a short advisory opinion, Fla. Ethics Op. 93-3, concluding only that a lawyer who receives an inadvertent disclosure of documents containing confidential information about an opponent is ethically obligated to notify opposing counsel of the fact of receipt, but leaving any further action up to the lawyers involved.

87. Subdivision (e) of RPC 4-3.4, "Fairness of Opposing Party and Counsel," provides that a lawyer shall not:

> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

R. REGULATING FLA. BAR 4-3.4(e).

88. 641 So. 2d 427 (Fla. 4th Dist. Ct. App. 1994).

89. "It is exasperating that, no matter how many times appellate courts cite this well-known rule [RPC 4-3.4(e)], trial counsel and trial judges do not seem to get the message." *Id.* at 430.

90. *Id.*

91. 655 So. 2d 1217 (Fla. 4th Dist. Ct. App. 1995).

statement, not supported by evidence, as to what other chiropractors have done.[92]

The First District Court of Appeal weighed in with its decision in *Sacred Heart Hospital of Pensacola v. Stone*.[93] The court reversed on the basis of repeated argument in violation of RPC 4-3.4(e) and remanded for a new trial, despite the fact that most of the improper argument had not been objected to at trial.[94] Improper comments included statements of personal opinion by plaintiff's counsel (e.g., that the defense's theory of fault was "ridiculous" and that one defendant presented "ridiculous" testimony), references to matters outside the record (e.g., a comment concerning alleged lying by an expert witness), and an invitation by plaintiff's counsel in closing argument to deal harshly with defendants.[95]

Finally, during the past year the supreme court promulgated two rules affecting a lawyer's ethical obligations in the trial setting. In amending RPC 4-3.4(b), the court specified the types of payments that ethically may be made by counsel to witnesses.[96] Lawyers may reasonably compensate witnesses for expenses actually incurred, or compensation actually lost, by virtue of appearing as a witness in a proceeding. The second rule amendment concerned what a lawyer permissibly may say about the lawyer's pending case in public, extrajudicial statements. Not inspired by the Simpson debacle, this change to RPC 4-3.6[97] actually resulted from the

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92. *Id.* at 1219.

93. 650 So. 2d 676 (Fla. 1st Dist. Ct. App.), *review denied*, 659 So. 2d 1089 (1995).

94. *Id.* at 681.

95. *Id.* at 680.

96. Amended subdivision (b) of RPC 4-3.4, "Fairness of Opposing Party and Counsel," provides that a lawyer shall not:

> (b) fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for the professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings.

R. REGULATING FLA. BAR 4-3.4(b).

97. Amended RPC 4-3.6, "Trial Publicity," provides:

> (a) Prejudicial Extrajudicial Statements Prohibited. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

decision of the Supreme Court of the United States in *Gentile v. State Bar of Nevada*.[98] Although intended to delete the "safe harbor" language in the prior version of the rule that was held to be unconstitutionally vague in *Gentile*,[99] the amended version of RPC 4-3.6 still provides only the most general guidance to a lawyer searching for the limits of what he or she may say publicly about a pending case. Lawyers, however, may take some comfort in the fact that there have been no reported Florida cases in which a bar member was disciplined for violating the trial publicity rule.

IV. PROFESSIONAL RESPONSIBILITY AND THE LAWYER'S RELATIONSHIP WITH THIRD PARTIES

A lawyer's professional relationships, of course, extend beyond dealing with clients and courts. The RPC interpose minimum ethical standards into many of a lawyer's relationships with third parties. During the past year, a number of decisions affected lawyers' relationships with persons and entities such as prospective clients, opposing parties, other lawyers, employers, employees, and the legal system.

The most significant lawyer advertising and solicitation decision in years was rendered by the Supreme Court of the United States in *Florida Bar v. Went For It, Inc.*[100] A lawyer and a for-profit lawyer referral service challenged Florida's RPC 4-7.4(b)(1)(A),[101] which requires that

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(b) Statements of Third Parties. A lawyer shall not counsel or assist another person to make such a statement. Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements that are prohibited under this rule.

R. REGULATING FLA. BAR 4-3.6.

98. 501 U.S. 1030, 1047 (1991).

99. Florida Bar *re* Amendments to Rules Regulating The Florida Bar, 644 So. 2d 282, 283 (Fla. 1994).

100. 115 S. Ct. 2371 (1995).

101. Subdivision (b)(1)(A) of RPC 4-7.4, "Direct Contact with Prospective Clients," provides:

(b) Written Communication.

(1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

(A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing

Florida lawyers wait for at least thirty days following an accident or disaster before sending targeted direct mail solicitation letters concerning personal injury, wrongful death, or other actions relating to the accident or disaster to accident victims or their families. This prohibition extends to lawyer referral services under RPC 4-7.8(a)(1).[102]

The court upheld the thirty-day waiting period rule after analyzing it under the three-prong commercial speech test[103] articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*[104] First, the Court agreed that the Florida Bar has "substantial interest in protecting the privacy and tranquility" of potential recipients against invasive, unsolicited contact by lawyers and in preventing the erosion of public confidence in the legal profession that such conduct engenders.[105] Second, the Bar effectively demonstrated that the challenged rule advances these interests in a direct and material way.[106] The Bar presented unrebutted evidence, both empirical and anecdotal, showing that both targeted harms are real. Third, the Court concluded that the thirty-day waiting period was a restriction "reasonably well-tailored" to achieve the desired objectives.[107] *Went For It, Inc.* was the first case since commercial speech protection was extended to lawyer advertising in *Bates v. State Bar of Arizona*[108] to uphold a state's restrictions on lawyer advertising. Undoubtedly this decision will inspire bar organizations around the country to reexamine lawyer advertising and advertising regulations within their jurisdictions.

Virtually all lawyers are aware that RPC 4-4.2[109] prohibits them from

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of the communication.

R. REGULATING FLA. BAR 4-7.4(b)(1)(A).

102. Subdivision (a)(1) of RPC 4-7.8, "Lawyer Referral Services," provides:

(a) When Lawyers May Accept Referrals. A lawyer shall not accept referrals from a lawyer referral service unless the service:

(1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer.

R. REGULATING FLA. BAR 4-7.8(a)(1).

103. *Went For It, Inc.*, 115 S. Ct. at 2381.

104. 447 U.S. 557, 568-71 (1980).

105. *Went For It, Inc.*, 115 S. Ct. at 2376.

106. *Id.* at 2378.

107. *Id.* at 2380.

108. 433 U.S. 350 (1977).

109. RPC 4-4.2, "Communication with Person Represented by Counsel," provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another

communicating with a represented person concerning the subject of the representation, unless the other person's lawyer consents. Difficulties often arise, however, when a lawyer who represents a client against a corporate entity attempts to apply this rule to possible contacts with current or former employees of the opposing entity. The Professional Ethics Committee concluded, in Florida Ethics Opinion 88-14, that it is not unethical for a lawyer to contact former employees of a represented opponent, provided the lawyer does not inquire into matters protected by the attorney-client privilege.[110] But Florida lawyers must be aware that courts, both state and federal, are moving to limit the broad range of action otherwise afforded by Opinion 88-14.

In *Barfuss v. Diversicare Corp. of America*,[111] a lawyer represented a person who allegedly suffered damages while staying in a nursing home operated by the defendant corporation. Upon motion by the defendant, the trial court entered an order forbidding plaintiff's counsel from any ex parte communication with former employees of the nursing home who cared for or treated the plaintiff. The Second District Court of Appeal affirmed this order, taking care to note that the order was limited in scope—it did not bar ex parte contact with all former employees, but only contact with "the very

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> lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by statute or contract, and a copy shall be provided to the adverse party's attorney.

R. REGULATING FLA. BAR 4-4.2. The Comment to RPC 4-4.2 goes on to explain, in pertinent part:

> In the case of an organization, this rule prohibits communications by a lawyer for 1 party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by the agent's or employee's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule.

Id. 4-4.2 cmt.

110. Fla. Ethics Op. 88-14, *reprinted in* PROFESSIONAL ETHICS OF THE FLA. BAR (2d ed.) at 1302. This opinion was approved by the Florida Bar Board of Governors on March 7, 1989. *Id.* at 1299.

111. 656 So. 2d 486 (Fla. 2d Dist. Ct. App. 1995).

persons whose actions or inactions form the basis for the complaint."[112] Therefore, the order precluded contact with former nursing home employees who cared for or treated the plaintiff, since their actions or inactions form the basis of the defendant's alleged liability. In a footnote, the court specified that "there is no restriction on contact with former employees who were merely witnesses to the care of [the plaintiff]."[113]

A federal court sitting in Florida also rendered a decision concerning ex parte contact with former employees of an organizational opponent. In *United States v. Florida Cities Water Co.*,[114] lawyers for the government sought an order allowing them ex parte contacts with the defendant corporation's former employees. The court denied the motion, concluding that the corporation's demonstrated interest in protecting privileged information required the government to provide the corporation's counsel with notice and opportunity to attend the government's interviews of former corporate employees.[115]

Both *Barfuss* and *Florida Cities Water Co.* must be considered by Florida lawyers contemplating ex parte contacts with former employees of an opposing party. It may be noted, however, that these cases rely upon the debatable decision handed down by the Middle District in *Rentclub v. Transamerica Rental Finance Corp.*[116] In *Rentclub*, a law firm that hired the former chief financial officer of a division of the opposing corporation as a paid "trial consultant" was disqualified from further participation in the case based upon the "consultant's" possession of privileged information about the corporate opponent and upon the appearance of impropriety. The court defined organizational party for purposes of the communication rule as including: "1) managerial employees, 2) any other persons whose acts or omissions in connection with the matter at issue may be imputed to the corporation for liability, and 3) persons whose statements constitute admissions by the corporation."[117] Cases following *Rentclub* may be building upon a shaky premise, however, because it is quite clear from a close reading of both the trial court and appellate court opinions that the

112. *Id.* at 488-89.
113. *Id.* at 489 n.5.
114. No. 93-281-CIV-FTM-21, 1995 WL 340980 (M.D. Fla. Apr. 26, 1995).
115. *Id.* at *3.
116. 811 F. Supp. 651 (M.D. Fla. 1992), *aff'd*, 43 F.3d 1439 (11th Cir. 1995).
117. *Id.* at 657.

decisions were greatly influenced by the fact that the former employee received a substantial sum as payment for his work as a "consultant."[118]

Contact with *un*represented opposing parties was the subject of Florida Ethics Opinion 94-4.[119] The Professional Ethics Committee concluded "that [o]pposing counsel may communicate with an individual who is litigating *pro se* concerning that litigation even though [a lawyer] is representing the individual in a related matter. Opposing counsel, however, may not communicate with the individual about the subject matter of the [lawyer]'s representation without the [lawyer]'s consent."[120]

Much of a lawyer's time is spent dealing with other lawyers, and several 1995 Professional Ethics Committee opinions addressed ethical issues arising in these relationships. Florida Ethics Opinion 94-7[121] provided the answer to the long-open question of whether lawyers who are "of counsel"[122] to one another are considered to be in the same firm, or different firms, for purposes of the fee division rules (RPC 4-1.5(g) and RPC 4-1.5(f)(4)(D)).[123] This question became especially pressing after the

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118. The penultimate paragraph of the Eleventh Circuit's opinion states:

> The district court found that the payment to Canales made it appear that Trenam, Simmons had both induced Canales to disclose confidential matters relating to Transamerica, in violation of Rules 4-1.6, 4-4.2 & 4-8.4(d) of the Rules Regulating The Florida Bar, as well as paid him for his factual testimony rather than his work as a "trial consultant," in violation of Rules 4-8.4(c) & 4-8.4(d). *Rentclub*, 811 F. Supp. at 654. *We conclude that the district court did not abuse its discretion in finding that there was the appearance of impropriety in the payment* to Canales. Accordingly, we AFFIRM the district court's order.

Rentclub, 43 F.3d at 1440 (emphasis by italics added; emphasis by capitals in original).

119. FLA. B. NEWS, Apr. 30, 1995, at 2.

120. *Id.*

121. *Id.*

122. The term "of counsel" may be used to describe a lawyer who maintains a close, continuing relationship with another lawyer or law firm in a capacity other than that of a partner or an associate. Fla. Ethics Op. 94-7, 75-41, 71-49. The relationship must be more than a mere referral arrangement. Fla. Ethics Op. 72-29.

123. Subdivision (g) of RPC 4-1.5, "Fees for Legal Services," provides:

> (g) Division of Fees Between Lawyers in Different Firms. Subject to the provisions of subdivision (f)(4)(D), a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:
>
> (1) the division is in proportion to the services performed by each lawyer; or
>
> (2) by written agreement with the client:
>
> (A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and

Supreme Court of Florida capped the amount of referral fee which a referring lawyer could receive in a personal injury matter without prior circuit court approval.[124] The committee decided that a lawyer "who is 'of counsel' to a law firm is considered to be a member of that firm for purposes of the fee-division rules *only* if that lawyer practices through that firm exclusively."[125]

Regarding another fee division issue, in *Barwick, Dillian & Lambert, P.A. v. Ewing*[126] the court held that the fee division provisions of the ethics code did not apply in a situation in which an associate lawyer and the employer law firm had agreed, during the associate's employment with the

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(B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.

R. REGULATING FLA. BAR 4-1.5(g). Subdivision (f)(4)(D) of RPC 4-1.5 provides:

(D) As to lawyers not in the same firm, a division of any fee within subdivision (f)(4) [governing contingent fee personal injury matters] shall be on the following basis:

(i) To the lawyer assuming primary responsibility for the legal services on behalf of the client, a minimum of 75% of the total fee.

(ii) To the lawyer assuming secondary responsibility for the legal services on behalf of the client, a maximum of 25% of the total fee. Any fee in excess of 25% shall be presumed to be clearly excessive.

(iii) The 25% limitation shall not apply to those cases in which 2 or more lawyers or firms accept substantially equal active participation in the providing of legal services. In such circumstances counsel shall apply for circuit court authorization of the fee division in excess of 25%, based upon a sworn petition signed by all counsel that shall disclose in detail those services to be performed. The application for authorization of such a contract may be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service of process on any party and this aspect of the file may be sealed. Authorization of such contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive. An application under this subdivision shall contain a certificate showing service on the client and The Florida Bar. Counsel may proceed with representation of the client pending court approval.

(iv) The percentages required by this subdivision shall be applicable after deduction of any fee payable to separate counsel retained especially for appellate purposes.

R. REGULATING FLA. BAR 4-1.5(f)(4)(D).

124. This limitation, which restricts the share of the "secondary lawyer" to 25% of the total fee, was adopted for all contracts entered into on or after January 1, 1988. Florida Bar *re* Amendments to Rules Regulating The Florida Bar, 519 So. 2d 971, 973 (Fla. 1987). The limitation is currently set forth in subdivision (f)(4)(D) of RPC 4-1.5, "Fees for Legal Services." *See* R. REGULATING FLA. BAR 4-1.5(f)(4)(D).

125. Fla. Ethics Op. 94-7 (emphasis added).

126. 646 So. 2d 776 (Fla. 3d Dist. Ct. App. 1994).

firm, that the associate would receive a certain percentage of the fees from cases brought to the firm by the associate.[127] However, the case in question was not concluded (and thus the fee was not received) by the firm until after the associate's employment with the firm ended. Accordingly, the court stated that, "[w]here, as here, [the associate's] sole claim is for services rendered at the [employer] firm, we do not believe that a new, post-departure set of agreements needed to be entered in order for [the associate] to assert her claim."[128]

The rationale of *Barwick* was followed in Florida Ethics Opinion 94-1.[129] In this opinion, the Professional Ethics Committee decided that an agreement between a law firm and an associate lawyer employed by the firm "concerning division of the fee from a case brought to the firm by the [associate was] not subject to the rules governing fee divisions between [lawyers] in different firms when the [associate] leaves the firm before the case is concluded."[130]

In contrast to the agreement at issue in Opinion 94-1, the fee division provisions in the associate-law firm employment agreement under scrutiny in hotly-contested[131] Florida Ethics Opinion 93-4[132] were to be triggered only if the associate left the firm and thereafter continued to work on matters for "the Employer's clients." In addition to a requirement that the departing associate pay the former firm "the greater of fifty percent (50%) of any fee received from said client or the Firm's quantum meruit," the agreement barred the associate from "seeking, directly or indirectly, any of the Employer's clients" and from "inducing, either directly or indirectly, any employee to quit or abandon the Employer."[133] The Committee concluded that, when read as a whole, the employment agreement violated RPC 4-5.6(a),[134] which prohibits a lawyer from offering or making a partnership or employment agreement that restricts a lawyer's right to practice after

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127. *Id.* at 779.

128. *Id.*

129. FLA. B. NEWS, July 15, 1994, at 2.

130. *Id.*

131. *See, e.g.*, Mark D. Killian, *Board Approves Employment-Agreement Ethics Opinion*, FLA. B. NEWS, Mar. 1, 1995, at 3.

132. *Id.* at 21.

133. *Id.*

134. Subdivision (a) of RPC 4-5.6, "Restrictions on Right to Practice," provides that a lawyer shall not participate in offering or making "(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement[.]" R. REGULATING FLA. BAR 4-5.6(a).

termination of the relationship. The Committee opined that the offending provisions created a substantial "financial disincentive" that would operate to "preclude the departing [associate] from accepting representation of [firm] clients," and would impermissibly restrict the right of association among lawyers.[135]

RPC 4-5.6 is not the only ethical standard governing the relationship between a law firm and its lawyer employees. A lawyer is obligated to deal honestly with the firm that employs him or her. In *Florida Bar v. Cox*,[136] a lawyer was suspended for thirty days for engaging in unauthorized outside employment against firm policy, willfully deceiving the firm about the "moonlighting," and diverting some fees paid in these matters from the firm to himself.[137]

A lawyer's relationship with his or her nonlawyer employees could be affected by an amendment to RPC 4-5.4,[138] concerning division of legal fees with nonlawyers. This revision clarifies the circumstances under which

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135. Fla. Ethics Op. 93-4.

136. 655 So. 2d 1122 (Fla. 1995). Specifically, the lawyer was found guilty of violating RPC 4-1.7(b) ("Conflict of Interest; General Rule"), RPC 4-4.1 ("Truthfulness in Statements to Others"), and RPC 4-8.4(c) ("Misconduct"). *Id.* at 1122 n.1.

137. *Id.* at 1123.

138. Subdivisions (a) and (b) of RPC 4-5.4, "Professional Independence of a Lawyer," provide:

> (a) Sharing Fees with Nonlawyers. A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
>
> (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to 1 or more specified persons;
>
> (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;
>
> (3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, in accordance with the provisions of rule 4-1.17, pay to the estate or other legally authorized representative of that lawyer the agreed upon purchase price; and
>
> (4) bonuses may be paid to nonlawyer employees based on their extraordinary efforts on a particular case or over a specified time period, provided that the payment is not based on the generation of clients or business and is not calculated as a percentage of legal fees received by the lawyer or law firm.
>
> (b) Qualified Pension Plans. A lawyer or law firm may include nonlawyer employees in a qualified pension, profit-sharing, or retirement plan, even though the lawyer's or law firm's contribution to the plan is based in whole or in part on a profit-sharing arrangement.

R. REGULATING FLA. BAR 4-5.4(a)-(b).

a lawyer may pay a bonus to these employees. A bonus may be based on the nonlawyer's "extraordinary efforts on a particular case or over a specified time period, provided that the payment is not based on the generation of clients or business and is not calculated as a percentage of legal fees received by the lawyer or law firm."[139] The supreme court thus reaffirmed the principle that nonlawyers may not ethically be paid for bringing in cases.[140]

Whether dealing with another lawyer over fees or other matters, a lawyer may come to believe that a fellow lawyer has engaged in unethical behavior. Regardless of the validity of this belief, however, the Professional Ethics Committee stated in Florida Ethics Opinion 94-5[141] that it ordinarily is unethical to *threaten* to file a disciplinary complaint against another lawyer. The committee reasoned that a lawyer is obligated under RPC 4-8.3[142] to report serious misconduct on the part of other lawyers and, accordingly, that to threaten not to file a report when otherwise required by this rule would itself be unethical. Furthermore, even in situations in which reporting is not required by RPC 4-8.3, the committee believed that threatening to file a grievance complaint in order to obtain an advantage from the other lawyer could be extortionate (thereby violating RPC 4-

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139. *Id.* 4-5.4(a)(4).

140. *See also* RPC 4-7.2(q), "Advertising," which provides:

> Payment for Recommendations; Lawyer Referral Services Fees. A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written or recorded communication permitted by these rules, may pay the usual charges of a lawyer referral service or other legal service organization, and may purchase a law practice in accordance with rule 4-1.17.

Id. 4-7.2(q).

141. FLA. B. NEWS, Apr. 30, 1995, at 2.

142. RPC 4-8.3, "Reporting Professional Misconduct," provides in pertinent part:

> (a) Reporting Misconduct of Other Lawyers. A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.
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> . . . .
>
> (c) Confidences Preserved. This rule does not require disclosure of information otherwise protected by rule 4-1.6.

R. REGULATING FLA. BAR 4-8.3.

8.4(b))[143] or would constitute "conduct . . . prejudicial to the administration of justice" (in violation of RPC 4-8.4(d)).[144]

It follows that falsely accusing another lawyer of misconduct is unethical. In *Florida Bar v. Adams*,[145] the supreme court so held and suspended the lawyer for ninety days.[146] Finally, in two instances involving child support obligations the supreme court addressed the matter of a lawyer's relationship with his or her children, and presumably with society (in the event the failure to pay support implicates the state's public assistance machinery). First, in *Florida Bar v. Taylor*,[147] the court declined to discipline a lawyer who had been held in contempt of a New Hampshire court for failing to pay substantial child support arrearages.[148] The supreme court took great care to distinguish between criminal contempt and civil contempt, stating that under its then-existing rules it could discipline lawyers for the former but, absent fraudulent or dishonest conduct, had no authority to impose discipline for the latter.[149] Then, just a few weeks after the *Taylor* decision, the court on its own motion promulgated new RPC 4-8.4(h), making it unethical for a lawyer to "willfully refuse, as determined by a court of competent jurisdiction, to timely pay a child support obligation."[150]

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143. Subdivision (b) of RPC 4-8.4, "Misconduct," provides that a lawyer shall not "(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects[.]" *Id.* 4-8.4(b).

144. Subdivision (d) of RPC 4-8.4, "Misconduct," provides that a lawyer shall not:

> (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

Id. 4-8.4(d).

145. 641 So. 2d 399 (Fla. 1994).

146. *Id.* at 399.

147. 648 So. 2d 709 (Fla. 1995).

148. *Id.* at 709.

149. *Id.* at 711.

150. The Comment to new RPC 4-8.4(h) expresses the court's view of the purpose behind the rule and its intended application:

> Subdivision (h) of this rule was added to make consistent the treatment of attorneys who fail to pay child support with the treatment of other professionals who fail to pay child support, in accordance with the provisions of section 61.13015, *Florida Statutes* (1993). That section provides for the suspension or denial of a professional license due to delinquent child support payments after

V. PROFESSIONAL RESPONSIBILITY IN THE DISCIPLINARY CONTEXT

Looking at the bigger picture, it is apparent that the position in society held by lawyers—trusted fiduciaries who are not only officers of the court, but who in the minds of many personify our system of justice[151]—justifies the imposition of ethical obligations commensurate with this position. In 1995, the Supreme Court of Florida, the ultimate authority over the admission to and practice of law in our state,[152] imposed disciplinary sanctions on a number of lawyers for a variety of offenses. This section of the article briefly reviews some significant disciplinary cases not previously discussed in parts II, III, or IV.

Initially, Florida lawyers should realize that, even in the absence of a substantive rules violation, they are obligated to respond in writing to accusations that are being investigated by the Florida Bar. Two rules, RPC 4-8.1[153] and RPC 4-8.4(g),[154] impose this duty. In *Florida Bar v. Grigs-*

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all other available remedies for the collection of child support have been exhausted. Likewise, subdivision (h) of this rule should not be used as the primary means for collecting child support, but should be used only after all other available remedies for the collection of child support have been exhausted. Before a grievance may be filed or a grievance procedure initiated under this subdivision, the court that entered the child support order must first make a finding of willful refusal to pay. The child support obligation at issue under this rule includes both domestic (Florida) and out-of-state (URESA) child support obligations, as well as arrearages.

R. REGULATING FLA. BAR 4-8.4(h) cmt.

151. *See generally Went For It, Inc.*, 115 S. Ct. 2371 (1995).

152. FLA. CONST. art. V, § 15.

153. Subdivision (b) of RPC 4-8.1, "Bar Admission and Disciplinary Matters," provides:

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

. . . .

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by rule 4-1.6.

R. REGULATING FLA. BAR 4-8.1(b).

154. Subdivision (g) of RPC 4-8.4, "Misconduct," provides that a lawyer shall not "(g) fail to respond, in writing, to any inquiry by a disciplinary agency when such agency is conducting an investigation into the lawyer's conduct." *Id.* 4-8.4(g). The pertinent portion of the Comment to RPC 4-8.4 explains:

A lawyer's obligation to respond to an inquiry by a disciplinary agency is stated in subdivision (g) and rules 3-4.8 and 3-7.6(g)(2). While response is mandatory,

by,[155] a lawyer was publicly reprimanded and placed on three years' probation for failing to respond to the Bar's investigative inquiries.[156] In mitigation, it was noted that the lawyer had been suffering from clinical depression.[157] Such a mitigating factor apparently was not present in *Florida Bar v. Grosso*,[158] because in that case a similar violation resulted in a ten-day suspension.[159]

Similarly, a lawyer who willfully evades the Bar's attempts at service faces disciplinary problems. In *Florida Bar v. Hawkins*,[160] a lawyer whom the court allowed to resign in lieu of disciplinary action was later investigated for violating the terms of the resignation order. The lawyer avoided service of an order to show cause, but nevertheless was disbarred for five years for violating the resignation order as well as avoiding service.[161]

In the view of the supreme court, perhaps the two most serious offenses are lying to a court and misappropriation of client funds. Both were present in *Florida Bar v. de la Puente*.[162] In *de la Puente*, a lawyer who repeatedly used client trust funds for his own purposes, forged signatures on checks in order to gain access to the funds, misrepresented information to a court in a probate proceeding, fabricated evidence in the disciplinary proceeding, and instructed a witness to lie, was disbarred for a minimum of ten years. The court noted that, "[s]everal of these actions, when considered alone, create a presumption that disbarment is the appropriate penalty."[163]

Another disciplinary case involving trust accounting violations is *Florida Bar v. Condon*.[164] In *Condon*, garden variety theft of client funds resulted in a three-year suspension to be followed by a probationary

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> the lawyer may deny the charges or assert any available privilege or immunity or interpose any disability that prevents disclosure of certain matter. A response containing a proper invocation thereof is sufficient under the Rules Regulating The Florida Bar. This obligation is necessary to ensure the proper and efficient operation of the disciplinary system.

Id. 4-8.4(g) cmt.

155. 641 So. 2d 1341 (Fla. 1994).
156. *Id.* at 1343.
157. *Id.* at 1342.
158. 647 So. 2d 840 (Fla. 1994).
159. *Id.* at 841.
160. 643 So. 2d 1074 (Fla. 1994).
161. *Id.* at 1075.
162. 658 So. 2d 65 (Fla. 1995).
163. *Id.* at 69.
164. 647 So. 2d 823 (Fla. 1994).

period.[165] In *Florida Bar v. Cramer*,[166] a lawyer violated trust accounting rules when he used his trust account in an apparent attempt to hide his own funds from the Internal Revenue Service.[167] Although no client funds were misappropriated, the court found that this attempt to mislead the IRS amounted to conduct involving "dishonesty, deceit, or misrepresentation," and imposed a ninety-day suspension.[168] In *Florida Bar v. Mitchell*,[169] commingling and other trust accounting violations netted a lawyer a ninety-day suspension, followed by a one-year probation.[170] There appeared to be no loss of any client funds, but among other violations, the supreme court found the lawyer guilty of failing to remit interest earned on his trust account to the Florida Bar Foundation as required under the Interest on Trust Accounts ("IOTA") program rules.[171] Also of interest in this case was the court's rejection of the lawyer's minority status as a mitigating factor.[172] Finally, trust accounting violations coupled with the charging of an excessive fee in a probate matter led to a ninety-day suspension in *Florida Bar v. Forrester*.[173] No theft occurred, but the lawyer moved funds from her trust account to her operating account before they were earned. In this case the court "expressly note[d] that we consider the maintenance of contemporary and accurate trust account records to be essential to public confidence that members of The Florida Bar are maintaining these accounts pursuant to their fiduciary and ethical obligations."[174]

As in other years, 1995 saw no shortage of disciplinary actions as a result of lawyers' involvement in criminal activity. In *Florida Bar v. Smith*,[175] the court suspended a former Congressman for three years as a result of felony convictions arising from income tax under-reporting and violation of federal election laws.[176] The presence of a number of mitigating factors helped the lawyer avoid disbarment,[177] the usual penalty for

165. *Id.* at 824.
166. 643 So. 2d 1069 (Fla. 1994).
167. *Id.* at 1070.
168. *Id.* at 1070-71.
169. 645 So. 2d 414 (Fla. 1994).
170. *Id.* at 416.
171. *Id.* at 415; *see* R. REGULATING FLA. BAR 5-1.1(e).
172. *Id.* at 416.
173. 656 So. 2d 1273, 1276 (Fla. 1995).
174. *Id.*
175. 650 So. 2d 980 (Fla. 1995).
176. *Id.* at 982.
177. *Id.* at 981.

such conduct. Disbarment did result from a lawyer's out-of-state criminal convictions for grand larceny and conspiracy in *Florida Bar v. Wilson*.[178]

A lawyer's involvement in criminal activity, even if he or she is not convicted of a crime, can still result in discipline. For example, the court disbarred a former circuit court judge caught in the Dade County "Operation Courtbroom" investigation, for his participation in bribery and misconduct while on the bench, in *Florida Bar v. Davis*.[179] Discipline was imposed despite the fact that the lawyer had been acquitted of federal criminal charges. It may be noted that the "clear and convincing" standard of proof used in disciplinary proceedings is lower, and thus easier to meet, than the "beyond a reasonable doubt" standard applied in criminal cases.[180] In *Florida Bar v. Wheeler*,[181] the supreme court disbarred a lawyer involved in the "Operation Courtbroom" probe for his misconduct, even though he avoided prosecution by testifying against fellow conspirators in exchange for immunity.[182] In *Florida Bar v. Marable*,[183] a lawyer expressed interest in obtaining the fruits of what a law enforcement informant led him to believe was a burglary.[184] In reality, the informant fabricated the story. The court rejected the referee's finding that the lawyer had committed the crime of solicitation of a burglary, but suspended the lawyer for sixty days for his "unethical behavior in involving himself and his client with the products of what he believed to be criminal activity."[185]

Neglect of client matters continued to be a cause for disciplinary action. In *Florida Bar v. Daniel*,[186] a lawyer earned a suspension of ninety-one days, and thereafter until rehabilitation was proved, for repeatedly neglecting client matters.[187] In *Florida Bar v. Robinson*,[188] however, mitigating factors helped a lawyer receive a reprimand rather than suspension.[189]

178. 643 So. 2d 1063, 1065 (Fla. 1994).
179. 657 So. 2d 1135 (Fla. 1995).
180. *See, e.g.*, Florida Bar v. Rayman, 238 So. 2d 594, 596-97 (Fla. 1970).
181. 653 So. 2d 391 (Fla. 1995).
182. *Id.* at 392.
183. 645 So. 2d 438 (Fla. 1994).
184. *Id.* at 440
185. *Id.* at 443.
186. 641 So. 2d 1331 (Fla. 1994).
187. *Id.* at 1332. RPC 3-5.1(e), "Types of Discipline," provides that: "A suspension of 90 days or less shall not require proof of rehabilitation or passage of the Florida bar examination. A suspension of more than 90 days shall require proof of rehabilitation and may require passage of all or part of the Florida bar examination." R. REGULATING FLA. BAR 3-5.1(e).
188. 654 So. 2d 554 (Fla. 1995).
189. *Id.* at 555-56.

Interestingly, the referee had recommended that the lawyer be ordered to notify his clients of the reprimand. The supreme court declined to impose this requirement.[190]

A case of note in the area of fees is *Florida Bar v. Garland*.[191] In *Garland*, the lawyer was charged with collecting an excessive fee in a probate case, along with other misconduct such as trust accounting violations and falsification of records. He paid himself almost $33,000 in fees, while expert testimony in the case indicated that a reasonable fee would have been between $15,000 and $18,000. Sometime *after* this occurred, legislative amendments to the probate code concerning calculation of reasonable fees to the personal representative and attorney of an estate became effective. Surprisingly, the supreme court found the lawyer not guilty of the excessive fee charge because "if the fee charged in this case were charged today it likely would be considered reasonable under the new statutory provisions."[192] Thus, it appears that, if a lawyer has the good fortune to do something that is improper under one rule and that rule is later changed, the lawyer may escape discipline. This seems like an incongruous result in view of the fact that lawyers are expected to conform their conduct to the rules and laws in existence when the conduct occurs.

Knowingly providing a false affidavit to a bank to help a relative secure a loan resulted in a sixty-day suspension for the lawyer in *Florida Bar v. Johnson*.[193] The court stated that it "will not condone attorneys making affidavits for submission to a lender or to any other person or entity which are in fact not true and correct as to the statements therein."[194]

In the past year, the court has also reaffirmed its willingness to impose what may be termed "reciprocal discipline" upon Florida lawyers who are disciplined by other jurisdictions in which they are admitted to practice law. In *Florida Bar v. Friedman*,[195] a member of the Florida Bar was suspended from practice in another state.[196] Based on the suspension order from the other state, the Supreme Court of Florida suspended the lawyer from practice in Florida.[197] The lawyer argued that Florida should not accept

190. *Id.* at 556.

191. 651 So. 2d 1182 (Fla. 1995).

192. *Id.* at 1184. Though not guilty of the excessive fee charge, the lawyer was found guilty of other misconduct and suspended for two years. *Id.*

193. 648 So. 2d 680, 682 (Fla. 1994).

194. *Id.* at 682.

195. 646 So. 2d 188 (Fla. 1994), *cert. denied*, 115 S. Ct. 1707 (1995).

196. *Id.* at 189.

197. *Id.* at 190.

the other state's suspension order because the other state's finding of guilt was premised on a "preponderance of the evidence" standard, rather than the "clear and convincing" test used in Florida. The supreme court rejected this argument.[198]

A final noteworthy development in the disciplinary area was the supreme court's adoption of a "Practice and Professionalism Enhancement Program," commonly referred to as an "ethics school."[199] This program is intended to divert from the disciplinary system lawyers who have committed minor transgressions and whose conduct, it is believed, could be improved through education in basic ethics rules, law office management, and interpersonal skills. No case in which the misconduct rises above the level of minor misconduct[200] is eligible for diversion, and a lawyer who has been the subject of a prior diversion within the past seven years is not eligible.[201]

VI. CONCLUSION

Professional responsibility has become almost a "growth industry" in recent years. Legal malpractice suits are becoming more common, grievance complaints are being filed at record rates, and motions to disqualify lawyers from trial representation have mushroomed. In fact, this increased attention on the legal ethics field has led to the formation of a national group for lawyers whose practices are concentrated in this area, the Association of Professional Responsibility Lawyers ("APRL"). Decisions rendered during the past year by Florida courts and ethics committees addressed a wide range of professional responsibility issues and must be given careful consideration by the practicing lawyer. Failure to adhere to the professional responsibility standards set forth in these decisions can have serious consequences.

198. *Id.*

199. The new rule 3-5.3 was adopted in Florida Bar *re* Amendments to Rules Regulating The Florida Bar, 644 So. 2d 282, 289-90 (Fla. 1994).

200. *See* R. REGULATING FLA. BAR 3-5.1(b).

201. *Id.* 3-5.1(c).

Property Law: 1995 Survey of Florida Law

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TABLE OF CONTENTS

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I. INTRODUCTION

This survey covers decisions of the Florida courts and Florida legislation produced during the period from July 1, 1994 through June 30, 1995 that the authors selected as being of special interest to the real estate practitioner.

II. ADVERSE POSSESSION

Seton v. Swann.[1] The Supreme Court of Florida has eliminated any question as to the requirements for obtaining title by adverse possession under color of title. In 1982, the Setons acquired the lot next to the one owned by the Swanns. A 1951 survey properly located the common boundary, but surveys in 1959, 1972, 1976, and again in 1984 had placed the boundary between the two lots in the wrong place. Relying on the 1984 survey, the Setons improved a strip of land which actually belonged to their neighbors. In addition, the Swanns built a fence along the incorrect boundary, although Mrs. Swann testified that she knew the fence was not at the edge of her land when the fence was built. When a 1992 survey revealed the correct boundary, the Swanns brought this ejectment action against the Setons. The trial court, accepting the defense of adverse possession under color of title, ruled for the Setons finding that they had acquired title.[2]

1. 650 So. 2d 35 (Fla. 1995).
2. *Id.* at 36.

The Fifth District Court of Appeal reversed[3] and the Supreme Court of Florida affirmed the district court in an unanimous opinion written by Justice Harding.[4] Adverse possession under color of title was in this case, and still is, controlled by section 95.16 of the *Florida Statutes* as amended in 1987.[5] In *Seddon v. Harpster*,[6] the Supreme Court of Florida interpreted an earlier version of this statute to allow an adverse possessor "under color of title" to acquire title to land which was not described in a written instrument if it was contiguous to the land described and protected by a substantial enclosure. Before the 1987 amendment, the statute read: "If only a portion of the land protected by the enclosure is included within the description of the property in the written instrument, judgment, or decree, only that portion is deemed possessed."[7] The supreme court held that this language clearly required all of the claimed land to be described in a recorded instrument in order to acquire title to it under this statute.[8] Thus, *Seddon* was the law in effect only between 1975 and 1987.[9]

III. BOUNDARIES

DuBois v. Amestoy.[10] The record in this ejectment action established that: 1) the appellees decided, based on a government survey, the proper boundary was a dike and ditch; 2) their neighbors' surveyor placed boundary stakes beyond that point on land the appellees considered to be theirs; 3) appellees pulled up the stakes and told their neighbors that they considered the dike and ditch to be the proper boundaries; and 4) their claim was not challenged by the neighbors. The appellees claimed that this established the dike and ditch as the boundary by the doctrine of acquiescence. The well-established element for locating a boundary by this doctrine is uncertainty or dispute as to the boundary's correct location by neighboring landowners

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3. Swann v. Seton, 629 So. 2d 935, 937 (Fla. 5th Dist. Ct. App. 1993), *aff'd*, 650 So. 2d 35 (Fla. 1995).

4. Seton v. Swann, 650 So. 2d at 38. Chief Justice Grimes and Justices Overton, Shaw, Kogan, Wells, and Anstead concurred.

5. *See* FLA. STAT. § 95.16(1), (2) (1991).

6. 403 So. 2d 409 (Fla. 1991).

7. FLA. STAT. § 95.16(2)(b) (Supp. 1974), *amended by* FLA. STAT. § 95.16 (1991).

8. Note, title can be acquired by adverse possession without color of title under section 95.18 of the *Florida Statutes*, but that was not discussed in this case.

9. The court expressly disapproved Turner v. Valentine, 570 So. 2d 1327 (Fla. 2d Dist. Ct. App. 1990), *review denied*, 576 So. 2d 294 (Fla. 1991) and Bailey v. Hagler, 515 So. 2d 679 (Fla. 1st Dist. Ct. App.), *review denied*, 587 So. 2d 1327 (Fla. 1991), which applied the *Seddon* logic after the 1987 amendment to section 95.16.

10. 652 So. 2d 919 (Fla. 4th Dist. Ct. App. 1995).

who acquiesce in a particular location for the prescriptive period. The district court concluded that the appellees were not entitled to summary judgment because "the record evidence permits different reasonable inferences on the issues of mutual uncertainty, location of a boundary by the parties, and acquiescence . . . ."[11] The moving party must establish all the elements and, having failed to do so, the district court reversed.[12]

Evers v. Department of Agriculture and Consumer Services.[13] The Division of Forestry filed an action for declaratory judgment seeking to locate the boundary of property it was leasing for a state forest from the Internal Improvement Trust Fund. A 1984 survey revealed that the neighboring landowners were using and claiming ownership to part of the land. The neighbors argued that there was an old agreement among their predecessors in title that a certain fence line constituted the boundary, and that subsequent owners, including the Division of Forestry, had acquiesced to that boundary.

The Division of Forestry claimed that a 1938 eminent domain proceeding by the federal government had vitiated the prior agreement and any boundary by acquiescence. It also claimed that the doctrine of boundary by acquiescence was not available to establish a boundary to public lands. The trial court granted summary judgment in favor of the Division.[14] The First District Court of Appeal reversed, in an opinion written by Judge Mickle, finding that there were genuine issues of material fact still in dispute.[15] First, the record did not establish that the neighbors or their predecessors were parties to the eminent domain proceeding. Second, the neighbors claimed that their predecessors had established a boundary by acquiescence against the predecessors of the Division. The First District Court of Appeal characterized the correct, but still unresolved issue as: "whether a governmental entity can later be bound as a successor in interest and therefore take the property subject to a previously acquiesced to boundary."[16]

Shultz v. Johnson.[17] Janice Shultz brought suit in circuit court seeking to ascertain the boundary line of her property, alleging boundary by acquiescence, boundary by agreement, and adverse possession. After the

11. *Id.* at 920.
12. *Id.* Judge Stevenson wrote the opinion. Judges Polen and Klein concurred.
13. 651 So. 2d 802 (Fla. 1st Dist. Ct. App. 1995).
14. *Id.* at 803.
15. *Id.* at 804.
16. *Id.*
17. 654 So. 2d 567 (Fla. 1st Dist. Ct. App. 1995).

trial court directed verdicts against Shultz in the acquiescence and agreement claims and vacated a jury verdict in favor of Shultz on her adverse possession claim, Shultz appealed.[18]

The First District Court of Appeal affirmed the directed verdict entered on the boundary by agreement claim because there was insufficient evidence of any agreement.[19] The court also affirmed the order vacating the jury verdict in favor of Shultz on her adverse possession claim because there was insufficient evidence to prove the essential element of the property being enclosed by a substantial enclosure for the seven-year period under section 95.16 of the *Florida Statutes*.[20]

However, it reversed and remanded on the boundary by acquiescence claim, and set out the elements of an acquiescence claim: 1) a dispute or uncertainty as to the location of the true boundary, implying a cognizance by both parties that the true boundary is in doubt; 2) location of a boundary line by the parties; and 3) the continued occupancy of, and acquiescence to, a line other than the true boundary line for a period of more than seven years.[21] The defendant claimed that there was no uncertainty as to the true boundary. The court disagreed, finding the requisite element of uncertainty as to the location of the true boundary.[22]

IV. BROKERS

Gauthier v. Florida Real Estate Commission.[23] The Smiths advertised their business for sale. When Gauthier, a broker, contacted them stating that he had a potential buyer, the Smiths responded that they did not want to use a broker or pay a brokerage commission. Subsequently, Gauthier and his prospect joined in making a purchase offer which was accepted. When the transaction broke down, the Smiths sued and won a $25,000 judgment against the two co-buyers. Because the money judgment was not satisfied, the Smiths filed a claim with the Real Estate Recovery Fund, the fund created by the legislature to protect the public from the misconduct of real estate brokers. After the Florida Real Estate Commission granted the claim and suspended Gauthier's license, the broker appealed.

18. *Id.* at 568.
19. *Id.* at 569.
20. *Id.* at 569-70.
21. *Id.* at 568.
22. *Shultz*, 654 So. 2d at 569.
23. 654 So. 2d 580 (Fla. 5th Dist. Ct. App. 1995).

The Fifth District Court of Appeal reversed in a soundly reasoned opinion written by Judge Cobb, finding no basis on which to hold the fund liable.[24] The plaintiffs would be entitled to recover from the fund if they had obtained a judgment holding that they had "suffered monetary damages by reason of [certain enumerated] acts committed as a part of any real estate brokerage transaction . . ."[25] or a judgment for damages "wherein the cause of action was based on a real estate brokerage transaction . . . ."[26] However, Gauthier, the broker, had not acted as a broker for these sellers. They had refused to hire him and they never relied on him as a broker. The sole reason the deal fell through was that the buyers did not perform their portion of the contract; the co-buyers had breached the purchase agreement, and the sellers had obtained a judgment for breach of the purchase contract. That judgment did not satisfy the statutory condition precedent to recovery from the Real Estate Recovery Fund.

Judge Thompson dissented, stating that the statute does not require an agency relationship to exist with the broker as a prerequisite to recovery from the fund.[27] In this case, the broker first became involved in the case in the role of a broker even though he later became a co-buyer. The Real Estate Commission predicated recovery on its finding that the sellers' harm resulted from incompetent drafting of the contract which the sellers allowed Gauthier to do because he was a licensed broker. Judge Thompson argued that the appellate court should not substitute its findings of fact for those of the Florida Real Estate Commission.[28]

Rauch v. Chama Investments, N.V.[29] Rauch, a real estate broker, procured a commercial tenant under a thirty-year lease for the landlord, Chama Investments. The brokerage agreement provided that the broker's commission was to be three percent of the gross annual rental for the term of the lease and any extensions of it.

Twenty years into the lease, the landlord and tenant modified the lease without the participation of the broker and after that the landlord refused to continue making commission payments. The trial court accepted the landlord's argument that Rauch was not entitled to further commissions because he had not taken part in the new lease. This was apparently based

24. *Id.* at 582.
25. FLA. STAT. § 475.482(1) (1991).
26. *Id.* § 475.483(1)(a).
27. *Gauthier*, 654 So. 2d at 583 (Thompson, J., dissenting).
28. *Id.*
29. 641 So. 2d 501 (Fla. 4th Dist. Ct. App. 1994).

upon the cases[30] which hold that a broker is not entitled to a commission under an extension clause if the parties enter into a lease after the original expires if it is substantially different from the original.[31] The Fourth District Court of Appeal reversed and remanded in a per curiam opinion,[32] finding this situation to be entirely different. Since this broker was seeking his commission for the original term, he could not be deprived of it because the landlord and tenant still enjoyed the benefits of the original lease, although under somewhat modified terms. The court, however, volunteered dicta that the broker's claim for annual commissions could be defeated by the tenant's abandonment.

Legislation of note with regard to brokers is Chapter 95-274 which amended section 721.20 to prohibit brokers from collecting advance fees for listing timeshares.[33]

V. CONDOMINIUMS

Casa Del Mar Condominium Ass'n v. Richartz.[34] The condominium association brought an action for an injunction to prevent future acts of physical violence against the association and its members perpetrated by Mr. Richartz. Mr. Richartz, irate about ongoing work related to his unit, had thrown the association president to the floor and uttered various threats.[35]

The trial court erroneously dismissed the action, holding that the association did not have standing because the dispute was between Richartz and the association president in his individual capacity.[36] Section 718.303 of the *Florida Statutes* specifically allows such actions to be brought by the association *or* by the individual unit owner, and the statute authorizes the use of injunctions to enforce condominium bylaws.[37]

Charley Toppino & Sons, Inc. v. Seawatch at Marathon Condo. Ass'n, Inc.[38] The Supreme Court of Florida answered the following certified question in the affirmative:

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30. Woodard Tire Co. v. Hartley Realty, Inc., 596 So. 2d 1114 (Fla. 3d Dist. Ct. App. 1992), *review denied*, 605 So. 2d 1264 (Fla. 1992); Cushman & Wakefield of Fla., Inc. v. Williams, 551 So. 2d 1251 (Fla. 2d Dist. Ct. App. 1989); Strano v. Reisinger Real Estate, Inc., 534 So. 2d 1214 (Fla. 3d Dist. Ct. App. 1988), *review dismissed*, 542 So. 2d 1334 (Fla. 1989).

31. *Rauch*, 641 So. 2d at 502.

32. Judges Anstead, Hersey, and Senior Judge Mager concurred.

33. *See* Ch. 95-274 discussed *infra* part XVIII.

34. 641 So. 2d 470 (Fla. 3d Dist. Ct. App. 1994).

35. *Id.* at 470.

36. *Id.*

37. *Id.* at 470-71.

38. 658 So. 2d 922 (Fla. 1994).

> Does section 718.124, Florida Statutes[(1987)], grant a condominium association an extended period of time in which it may assert a cause of action for damage to common elements in condominium buildings, beyond the time granted in section 718.203, Florida Statutes [(1987)], after unit owners have elected a majority of the members of the board of administration?[39]

The Seawatch Condominium was built and occupied by 1983, and control of the association passed from the developer to the unit owners on August 10, 1985. The association filed a section 718.203 breach of implied warranty suit on May 13, 1988, for damages due to the developer's use of allegedly defective concrete and metal decking resulting in cracking and seepage of rust-stained water onto cars parked below the building.[40]

The statute of limitations for implied warranty actions is four years.[41] However, section 718.124 tolls the running of the limitation period until control of the association passes from the developer to the unit owners.[42] The Third District Court of Appeal reversed the circuit court's dismissal, based on the tolling provision, but nevertheless certified the above question for clarification.[43] The Supreme Court of Florida approved the District Court of Appeal's decision, noting that the right to bring a warranty action belongs to the unit owners, and that they can exercise their right collectively through their association.[44]

In his dissent, Justice Harding argued that *expressio unius est exclusio alterius*, when applied to the tolling provision, indicated that it only applied to actions in which the association was the real party in interest, and not in actions accorded to the unit owners individually.[45] Justice Harding found nothing in the language of section 718.203 [breach of warranty section] to support the majority's holding that such actions can be brought by condominium associations on behalf of the unit owners. As such, he argued that the unit owners had sat on their rights and were using the association to revive their cause of action.

Under the facts of this case, where the defects involved the building's internal structure and composition, it seems more appropriate to have the association represent the common interests of the unit owners, making Justice Harding's position unpersuasive.

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39. *Id.* at 923.
40. *Id.*
41. FLA. STAT. § 95.11(3)(c) (1987).
42. *Id.* § 718.124.
43. *Charley Toppino & Sons, Inc.*, 658 So. 2d at 923.
44. *Id.* at 924.
45. *Id.* at 926. (Harding, J., dissenting).

Horizons Condominium Management Ass'n. v. Salvato.[46] The Salvatos owned a unit in the condominium. The declaration of condominium had an incorrect legal description of the unit, erroneously including a side yard as part of the unit. As a result of this error the Salvato's unit was assessed higher ad valorem property taxes and higher condominium assessment fees, causing a pending sale of the unit to fall through when the potential buyer found out about the higher charges on that unit.[47]

The Salvatos sued for damages for the lost sale, the higher taxes, and for reformation of the legal description in the declaration of condominium. The trial court held in their favor. The Fifth District Court of Appeal affirmed the reformation, but reversed the damage award.[48] It reasoned that damages for the lost sale were not based on any legally acceptable evidence of loss.[49] The overpaid taxes were a matter for the Salvatos to litigate against the county tax assessor, not the association.[50]

Ocean Trail Unit Owners Ass'n, Inc. v. Mead.[51] The Supreme Court of Florida answered the following certified question from the Fourth District Court of Appeal in the affirmative:

> WHETHER A CONDOMINIUM ASSOCIATION CAN ENFORCE A SPECIAL ASSESSMENT IMPOSED TO PAY JUDGMENTS, ATTORNEY'S FEES AND COSTS INCURRED IN CONNECTION WITH A LAWSUIT BROUGHT BY UNIT OWNERS AGAINST THE ASSOCIATION IN WHICH THE ASSOCIATION'S PURCHASE OF REAL PROPERTY WAS INVALIDATED AS AN UNAUTHORIZED ACT AND SUBSEQUENTLY RESCINDED.[52]

The case involved the association's attempt to purchase real property apparently valued at over $630,000. The association imposed a $1500 special assessment to pay for the purchase, and 150 unit owners brought suit, claiming that the attempted purchase was beyond the power of the association's board of directors. The unit owners prevailed, and their attorneys were awarded $194,079.37 in fees. The association had to refund the special assessment, and sought to impose another special assessment of

46. 641 So. 2d 922 (Fla. 5th Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1195 (Fla. 1995).
47. *Id.* at 924.
48. *Id.*
49. *Id.*
50. *Id.*
51. 650 So. 2d 4 (Fla. 1994).
52. *Id.* at 5-6.

$500 to pay for the attorney's fees resulting from the litigation. The unit owners again sued for a declaratory judgment that the $500 special assessment was unauthorized, and for breach of fiduciary duty arising from the selective disbursement of the refunds to only those unit owners who sued.

The circuit court held that the $500 special assessment was an authorized common expense, but the Fourth District Court of Appeal reversed, holding that the association could not be authorized to impose assessments to pay for the consequences of acts which were themselves unauthorized.[53] The Supreme Court of Florida reversed the Fourth District Court of Appeal's decision and remanded with orders to affirm the circuit court's judgment.[54] The court based its decision on a logical reading of chapter 718, finding that judgments against an association make the common elements subject to execution and levy, and an association is empowered to impose special assessments to protect the common elements.[55] Justice Kogan argued in his partial dissent that the Condominium Act did not sanction such a result, in which the unit owners were forced to pay the judgment they obtained.[56]

Residential Communities of America v. Escondido Community Ass'n.[57] Escondido Community Association ("ECA"), recorded an amendment to the declaration of condominium which prevented the sale of any condominium unit to a person unless the occupant was fifty-five or older. The developer, Residential Communities of America ("RCA"), sued because the amendment was passed without the necessary approval of RCA. RCA also sought damages and attorney's fees in the trial court, claiming that the amendment amounted to a slander of title. The case ultimately reached the Fifth District Court of Appeal, which ruled in favor of the developer RCA, holding that ECA had acted in good faith, and therefore that RCA was required to prove actual malice in order to prevail in its slander of title claim.[58] Since ECA had made no false or malicious statement, RCA was unable to prove damages.

53. *Id.* at 6.
54. *Id.*
55. *Id.*
56. *Ocean Trail Unit Owners Ass'n, Inc.*, 650 So. 2d at 8 (Kogan, J., dissenting).
57. 645 So. 2d 149 (Fla. 5th Dist. Ct. App. 1994).
58. *Id.* at 151.

Chief Judge Harris dissented, arguing that good faith and lack of malice was irrelevant and that RCA should be awarded attorney's fees for having to bring the suit in the first place.[59]

Rosso v. Golden Surf Towers Condominium Ass'n.[60] The condominium association owned a dock. Rosso used the dock to moor his forty-seven foot sailboat. The association informed Rosso that there was a monthly charge of $2.00 per linear foot for the exclusive use of the dock space. Rosso paid the fee initially, but stopped paying when the association increased the fee to $3.00 per linear foot. The association then obtained a preliminary injunction removing the sailboat from the dock, and it sued to collect the unpaid fees. Rosso claimed that no fee for the use of common elements was permitted under chapter 718 of the *Florida Statutes*, but the Fourth District Court of Appeal disagreed.[61]

The association can charge a fee for the use of common elements if the declaration of condominium provides for such practice and a majority of the association votes to adopt the practice, unless the charges relate to one owner having exclusive use of the property.[62] The court held that a genuine issue of material fact existed as to whether the association had met any of the alternatives to support its action in charging the fee.[63]

Additionally, if the fee were permitted, the association would have to, under section 718.111(4), create rules and regulations regarding the terms of the usage fees. The district court affirmed the injunction, reversed the summary judgment in favor of the association, vacated the award of attorney's fees, and remanded.[64]

Greens of Town 'N Country Condominium Ass'n v. Greens of Tampa, Inc.[65] The condominium association appealed a dismissal with prejudice of its complaint against the developer and the pre- and post-turnover directors. The cause of action was negligence in design, construction, inspection, repair, and maintenance of the condominium's roof and electrical wiring. The Second District Court of Appeal affirmed the dismissal based on the economic loss rule which requires the remedy to be in contract when

59. *Id.* at 151 (Harris, J., dissenting).
60. 651 So. 2d 787 (Fla. 4th Dist. Ct. App. 1995).
61. *Id.* at 788.
62. *Id.*
63. *Id.* at 789.
64. *Id.*
65. 653 So. 2d 1136 (Fla. 2d Dist. Ct. App. 1995).

a contract exists.[66] However, it reversed the order making the dismissal without prejudice, allowing the association to amend its complaint.[67]

With regard to legislation, Chapter 95-274 made important changes to Chapter 718 as well as homeowner association provisions in Chapter 617. Chapter 95-274 is discussed in Part XVIII.

VI. CONSTRUCTION

Murthy v. N. Sinha Corp.[68] The contract provided for the N. Sinha Corporation to build additions and improvements to the owners' home. The corporation commenced this action to foreclose on its mechanic's lien and for breach of contract. The homeowners counterclaimed and filed affirmative defenses based upon claims that the work was defective. The homeowners also filed a third-party complaint against the corporation's president, N. Sinha, as the corporation's qualifying agent. Chapter 489 of the *Florida Statutes* requires that a business organization such as a corporation, acting as a contractor, have an individual licensed contractor act as the "qualifying agent" for the corporation.[69] The homeowners claimed that the statute's imposition of duties on the qualifying agent to supervise the construction impliedly created a private cause of action for breach of that duty.[70] The Third District Court of Appeal dismissed the claim because N. Sinha individually was not a party to the contract. The Supreme Court of Florida, in an unanimous opinion written by Senior Justice McDonald,[71] agreed. The court stated that "legislative intent, rather than the duty to benefit a class of individuals, should be the primary factor considered by a court in determining whether a cause of action exists when a statute does not expressly provide for one."[72] It found no evidence in the language of the statute or the legislative history suggesting the legislature intended to create a private cause of action. The general rule is that a statute which provides for the safety or welfare of the general public will not be construed to create a private cause of action in the absence of express language. Consequently, no cause of action existed against the qualifying agent for breach of his supervisory duties.

66. *Id.* at 1137.
67. *Id.*
68. 644 So. 2d 983 (Fla. 1994).
69. FLA. STAT. § 489.119 (1991).
70. *Murthy*, 644 So. 2d at 985. *See* FLA. STAT. §§ 489.105(4), 489.115 (1991).
71. Chief Justice Grimes and Justices Overton, Shaw, Kogan, and Harding concurred.
72. *Murthy*, 644 So. 2d at 985.

Hendry Corp. v. Metro-Dade County.[73] This case involved a contract to demolish the old Rickenbacker Causeway connecting Key Biscayne to the mainland. The County withheld part of the payment under the contract when the contractor failed to complete the work as scheduled. Hendry sued the County, alleging the County was liable for costs arising from unexpected site conditions which it failed to disclose (such as subsurface debris and pilings of wood instead of concrete, both making the job more difficult). The trial court rejected Hendry's request to have the jury instructed that the County had a duty to disclose all available information on the project and to warrant that plans and specifications provided were full, complete, and accurate.[74] The district court held that was not an error.[75] Judge Jorgenson's majority opinion stated, "our courts have recognized only that the government has an affirmative duty to provide bidders with information that will not mislead them."[76]

Judge Baskin dissented based upon the terms of the contract. The contract contained a differing site condition ("DSC") clause which provided:

> The Contractor shall promptly, and before such conditions are disturbed, notify the Engineer in writing of: (1) Subsurface or latent physical conditions at the site differing materially from those indicated in this Contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as in work of the character provided for in this Contract. The Engineer will promptly investigate the conditions, and if he finds that such conditions do materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment will be made and the contract modified accordingly.[77]

This type of clause is common in public works contracts. It "shifts the normal contractual risk of additional costs incurred from an unexpected condition from the bidder [i.e., the contractor] to the contracting public

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73. 648 So. 2d 140 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 659 So. 2d 1087 (Fla. 1995). This replaces the original opinion at 18 Fla. L. Weekly D2301a which was withdrawn after the granting of a motion for rehearing.

74. *Id.* at 141.

75. *Id.* at 142.

76. *Id.* at 141 (citations omitted).

77. *Id.*

authority."[78] The contractor need not allege or prove fraud or misrepresentation on the part of the public authority. Judge Baskin concluded that the requested jury instruction was accurate given the DSC clause in this contract and thus the contractor should have been entitled to reversal.

Hummel v. Stenstrom-Strump Construction & Development Corp.[79] Owners of land entered into a contract for the construction of a home on their lot. The builder submitted the plans to the City of Sanford for approval, and then built the home. After the City issued a certificate of occupancy, the landowners moved in. A short time later, stormwater caused significant physical damage to the home and the contents. The landowners sued the builder under a variety of theories and also sued the City of Sanford for negligence in approving the plans and inspecting the builder's work, for breach of the City's warranties contained in the certificate of occupancy, and for negligent operation and maintenance of its stormwater drainage system. The City asserted sovereign immunity and argued that it owed no duty to the plaintiffs.

The Fifth District Court of Appeal[80] affirmed the trial court's dismissal of the claims against the City for negligence in approving the plans and inspecting the construction, as well as the claims for breach of warranties based on the certificate of occupancy.[81] This case presented a novel situation because this landowner was the one who had paid the inspection fee to the City.[82] Regardless of that distinction, the court followed the policy set out by the Supreme Court of Florida in *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*,[83] where it said, "[w]e find that the enforcement of building codes and ordinances is for the purpose of protecting the health and safety of the public, not the personal or property interests of individual citizens. . . ."[84] The district court, however, reversed the trial court's dismissal of the action based on failure to maintain and operate its stormwater drainage system.[85] Such actions may be brought

78. *Hendry Corp.*, 648 So. 2d at 143 (Baskin, J., dissenting).

79. 648 So. 2d 1239 (Fla. 5th Dist. Ct. App. 1995).

80. Chief Judge Harris wrote the opinion in which Judges Goshorn and Diamantis concurred.

81. 648 So. 2d at 1240.

82. *Compare* Victoria Village G Condominium Ass'n v. City of Coconut Creek, 488 So. 2d 900 (Fla. 4th Dist. Ct. App.), *review denied*, 497 So. 2d 1218 (Fla. 1986) *with* Friedberg v. Town of Longboat Key, 504 So. 2d 52 (Fla. 2d Dist. Ct. App. 1987).

83. 468 So. 2d 912 (Fla. 1985).

84. *Hummel*, 648 So. 2d at 1240 (quoting *Trianon*, 468 So. 2d at 922-23).

85. *Id.* at 1240-41.

against municipalities if their drainage systems fail to operate as intended or fail to meet the standards required by the building codes.[86]

Martin v. Jack Yanks Construction Co.[87] The homeowner appealed the trial court's judgment in favor of Yanks Construction, holding that the landowner had breached the construction contract the parties had entered into, and denying Martin punitive damages in its action to remove a lien fraudulently filed by Yanks.

Shortly after Hurricane Andrew, the landowner signed a repair "proposal" to return the home to its pre-hurricane condition with the final price for the work to be worked out between Yanks and Martin's insurer. After the landowner prevented Yanks from commencing the work, Yanks filed a claim of lien for the entire $107,208.60 insurance check issued by Martin's insurer, arguing that it was entitled to file the lien based on the underlying contract.

The Third District Court of Appeal, in an opinion by Judge Nesbitt, agreed with the homeowner. It held the contract was void for indefiniteness because of the "absence of a definite price or a means of determining a price not left solely to the contractor's discretion . . . ."[88] The court also concluded that the landowner was entitled to claim punitive damages under *Florida Statutes* section 713.31. A contractor may have a lien "for any money that is owed to him for labor, services, materials, or other items required by, or furnished in accordance with the direct contract."[89] Since Yanks had not furnished anything, the lien was held to be fraudulent.

Nystrom v. Cabada.[90] Nystrom built his own house even though he was not a licensed contractor. After living there for about one year, he sold it. The buyer experienced problems with walls cracking and doors sticking. Engineers inspected the property and reported it to be hazardous. The buyer sued, claiming breach of implied warranty, fraud, rescission of contract, breach of contract, negligence, and violation of the county building code. After winning on the merits, the court gave the buyer the option of rescinding the purchase and getting back the purchase price or a damage judgment for the full purchase price. Of course, she chose the latter because that meant she could also keep the property and continue to live in the house. The Second District Court of Appeal, in an opinion by Judge

86. *Id.* at 1240; *see* Slemp v. City of North Miami, 545 So. 2d 256 (Fla. 1989).
87. 650 So. 2d 120 (Fla. 3d Dist. Ct. App. 1995).
88. *Id.* at 121.
89. *Id.* (quoting FLA. STAT. § 713.05 (1993)).
90. 652 So. 2d 1266 (Fla. 2d Dist. Ct. App. 1995).

Patterson, affirmed[91] on the issue of liability, holding that the Nystroms had a duty to disclose the defects and the fact that the house was built by an unlicensed contractor. The court reversed on the issue of damages, however, holding that Cabada should not have been given the option of obtaining a money judgment for the full purchase price of the property and keeping the property.[92] Therefore, the case was remanded for a new trial on the issue of damages.

Oriole Homes Corp. v. Bellsouth Telecommunications, Inc.[93] The developer and the utility were involved in a dispute over who should bear the cost of road widening. *Florida Statutes* sections 125.42 and 337.403 allocate responsibility between a public body and a utility in a road widening or extension case. Judge Glickstein's opinion relied upon the first district's interpretation of an earlier statute[94] to reach the conclusion that the developer must bear the cost of road widening when the decision to widen to road is made by a developer for private benefit.

VII. COVENANTS, DEEDS, AND RESTRICTIONS

Antioch University v. Dept. of Natural Resources.[95] Antioch University sued to enforce the reverter clause contained in two deeds which conveyed land in Broward County to the State of Florida with the proviso that it "shall be used and devoted solely and exclusively for State Park purposes . . . ."[96] The land became known as Hugh Taylor Birch State Park, named after the original grantor, who granted the reverter interest to Antioch. The basis for Antioch's claim to enforce the reverter was that the installation of storm water outfall pipes, use of structures as concession or refreshment stands, the presence of a Department of Transportation trailer, power lines and water mains, and the operation of a landfill or dump violated the exclusive use provision in the deeds. The Fourth District Court of Appeal affirmed the trial court's decision holding that the above did not violate the deed conditions and that Antioch was not entitled to enforce the reverter clause.[97]

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91. Acting Chief Judge Danahy and Judge Fulmer concurred.

92. *Nystrom*, 652 So. 2d at 1268.

93. 641 So. 2d 504 (Fla. 4th Dist. Ct. App. 1994).

94. Century Constr. Corp. v. Central Tel. Co., 370 So. 2d 825 (Fla. 1st Dist. Ct. App. 1979) (interpreting FLA. STAT. § 338.19 (1977)).

95. 647 So. 2d 915 (Fla. 4th Dist. Ct. App. 1994), *review denied*, 659 So. 2d 270 (Fla. 1995).

96. *Id.* at 915.

97. *Id.* at 915-16.

Blue Reef Holding Corp., Inc. v. Coyne.[98] Blue Reef appealed the denial of a temporary injunction after the trial court determined that a declaration of restrictions to real property gave a developer the right to change the size and configuration of the recreation area in the development without obtaining the consent of the owners. The developer of Jupiter Key recorded covenants and restrictions describing the recreation area and stating that the designated area could only be used for recreational purposes. The declaration also stated that the covenants could be amended by the developer without consent of the owners, but "no amendment to this declaration shall be effective which would increase the liabilities of the then Owner or prejudice the rights of a then Owner . . . to utilize or enjoy the benefits of the then existing Common Property unless the Owner or Owners . . . consent to such amendment . . . ."[99] The developer reduced the size of the recreational area without recording any amendment, and without obtaining the consent of the appellant owner.

The Fourth District Court of Appeal reversed the denial of the temporary injunction because the reduction meant that the land was not going to be used only for recreational purposes, and it prejudiced the rights of the owners to enjoy the "then existing Common Property" in violation of the covenants.[100] Consent from the owners was required.[101]

Brower v. Hubbard.[102] The Browers owned a single-family home in a subdivision called Suburban Acres. The deed to their property contained restrictive covenants prohibiting any building in excess of two stories in height, and prohibiting noxious or offensive activity which may be a nuisance to the neighborhood. Their eighty-seven foot tower antenna was held to be a violation of these covenants, and they were ordered to remove it and to refrain from further radio transmissions. The Fourth District Court of Appeal affirmed the trial court's ruling that the antenna had to be removed, but reversed on the prohibition against further transmission on grounds that this part of the decision was overly broad.[103]

Dolphins Plus, Inc. v. Hobdy.[104] Dolphins Plus is a volunteer nonprofit organization dedicated to caring for and rehabilitating injured or sick marine mammals in Key Largo. The organization owns land in Key

98. 645 So. 2d 1053 (Fla. 4th Dist. Ct. App. 1994).
99. *Id.* at 1054.
100. *Id.* at 1055.
101. *Id.*
102. 643 So. 2d 28 (Fla. 4th Dist. Ct. App. 1994).
103. *Id.* at 29.
104. 650 So. 2d 213 (Fla. 3d Dist. Ct. App. 1995).

Largo Ocean Shores addition subdivision, as does Hobdy and several others. Hobdy and others sought declaratory and injunctive relief against Dolphins Plus because the organization had fenced in the area depicted on a platted subdivision as a "boat basin," and used it as a pen for the injured marine mammals. Dolphins Plus had previously obtained a lease from the heirs of the subdivision developer to use the "boat basin" as a pen, and had also obtained permission from Monroe County and the Department of Environmental Regulation.[105]

Hobdy and the other property owners argued that the fence and Dolphins Plus's use of the basin for purposes unrelated to the mooring of boats violated the plat restrictions and unreasonably interfered with their use and enjoyment of the basin. The Declaration of Restriction reads: "No structure, building, dock, ramp, barge or any other thing or condition shall be permitted to impede or obstruct navigation in the waterway; boat basins excepted . . . ."[106]

The trial court ruled in favor of the objecting property owners, holding that the restriction and the term "boat basin" clearly prohibited Dolphins Plus's use of the basin as a pen.[107] Furthermore, the lease from the developer's heirs did not release or terminate the plat restriction. The Third District Court of Appeal affirmed, stating that, "a restriction imposed alike upon all the lots of a block or tract of land cannot be released to one purchaser or his grantee without the assent of the other purchasers, or their grantees, for whose benefit it was imposed."[108]

Metropolitan Dade County v. Sunlink Corp.[109] Sunlink entered into a contract to sell forty acres of vacant land in northern Dade County. The land was encumbered by a restrictive covenant which prevented the land from being sold to anyone other than an entity owned, controlled by, or affiliated with AT&T. The covenant was created before AT&T was restructured, and Sunlink was a former AT&T affiliate. The covenant was to run from December, 1974, for thirty years, and to be extended automatically for successive ten-year periods unless an instrument recorded and signed by a majority of the then owner(s) of the real property, and a majority of those owners within 500 feet of the boundary of the property, agree to change the

105. *Id.* at 213-14.

106. *Id.* at 214.

107. *Id.*

108. *Id.* (quoting GEORGE W. THOMPSON, THOMPSON ON REAL PROPERTY § 3173 (4th ed. 1962)).

109. 642 So. 2d 551 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1196 (Fla. 1995).

covenants in whole or in part, providing the covenants have first been released by the [Dade County] Commission. The prospective buyer did not fit this restriction and the County argued that Sunlink could not sell the land without obtaining the permission of the several thousand neighboring property owners to release the restrictive covenant.[110]

Sunlink sued in circuit court, seeking termination of the covenant due to changed circumstances, and argued in the alternative that the covenant was an unlawful restraint against alienation. The circuit court granted Sunlink summary judgment, holding that the covenant was an illegal restraint against alienation, and the County appealed.[111] The initial decision from the Third District Court of Appeal affirmed the circuit court. However, the County's motion for a rehearing en banc was granted and the en banc court reversed, instructing Sunlink to seek the permission to release the covenant from the neighboring property owners. The court held that the restriction was not an unreasonable restraint against alienation because it was subject to cancellation or modification and was not perpetual.[112] The goal of the covenant, to preserve the character of the neighborhood for the general welfare of the public, was reasonable.

Judge Baskin's dissent restated the law in Florida on the validity of restraints against alienation: validity is determined by measuring the term of duration of the restraint, the type of alienation precluded, and the size of the class precluded from taking. Here, Judge Baskin argued that these factors clearly indicated that the restraint should be void, and criticized the majority's reliance on *Metropolitan Dade County v. Fountainbleu Gas & Wash, Inc.*[113] That case dealt with an attempt to circumvent a zoning restriction, which Judge Baskin explained is a different issue from an unreasonable restraint against alienation.[114]

Judge Cope argued that the answer to this case was given in *Davis v. Geyer.*[115] The Supreme Court of Florida in *Davis* held that "[a] condition to alien only to a particular person . . . is void . . ." citing the *Statute of Quia Emptores* in support of its decision.[116] Judge Cope went further, however, stating that the remedy in such a case should be determined by an

110. *Id.*

111. *Id.* at 552.

112. *Id.* at 556.

113. *Id.* (Baskin, J., dissenting); *see* Metropolitan Dade County v. Fountainbleu Gas & Wash, Inc., 570 So. 2d 1006 (Fla. 3d Dist. Ct. App. 1990).

114. *Sunlink Corp.*, 642 So. 2d at 556.

115. *Id.* at 558; *see* Davis v. Geyer, 9 So. 2d 727 (Fla. 1942).

116. *Davis*, 9 So. 2d at 730.

evidentiary hearing, because the covenant may have been taken into consideration when negotiating the sale of the property.[117]

Legislation impacting the law of covenants consisted of Chapter 95-274 which provides in relevant part, that homeowner association covenants survive after tax and foreclosure sales.[118]

VIII. EASEMENTS

Cook v. Proctor & Gamble Cellulose Co.[119] Proctor & Gamble brought an action to establish a prescriptive easement for ingress and egress over property owned by the appellants Cook and Rives. Proctor & Gamble had no action in its own right because the property owners' predecessor in title had given Proctor & Gamble's predecessors permission to construct and use the roadway. In fact, the former owner used the road herself. The land in question consisted of the southernmost 700 feet of a twenty-two mile road which had been used for many years by Proctor & Gamble and its predecessor for commercial purposes. In support of its action to establish a public easement, Proctor & Gamble presented evidence of only four people who testified that they had used the road for more than the required twenty years.

The requirements in Florida to obtain a right of use by prescription are: actual, continuous, adverse, and inconsistent uninterrupted use of the lands of another for the prescribed twenty-year period. Therefore, Proctor & Gamble sought to establish a "public" prescriptive easement. The trial court held in favor of Proctor & Gamble and the property owners appealed.[120] The First District Court of Appeal reversed, holding that use by four people was insufficient to establish substantial use by the public so as to lead to a public prescriptive right.[121] In order to establish a public prescriptive easement, the land must be used by the public in general.[122] Additionally, the First District Court of Appeal held that Proctor & Gamble's use was not inconsistent with the owner's use of the land. "Doubts as to the creation of a prescriptive right must be resolved in favor of the landowner. . . . Under

117. *Sunlink Corp.*, 642 So. 2d at 558.
118. Chapter 95-274 is discussed later in this article. *See infra* part XVIII.
119. 648 So. 2d 180 (Fla. 1st Dist. Ct. App. 1994).
120. *Id.* at 180-81.
121. *Id.* at 181.
122. *Id.*

Florida law, any use in common with the owner is presumed to be subordinate to the owner's title and with the owner's permission."[123]

Finally, the court held that Proctor & Gamble lacked standing to assert the rights of the public.[124] It was plain to the court that Proctor & Gamble's purpose in bringing the action was not to benefit the public, but instead to benefit its own interests, because during the three years of litigation, no other member of the public or representative body had come forward to establish the easement. The court stated that in order to bring an action to redress a public wrong, a plaintiff must demonstrate that he suffered or is threatened with some special, particular, or peculiar injury growing out of the public wrong.[125] Associate Judge Reynolds disagreed on the standing issue in his partial dissent, arguing that the longer route Proctor & Gamble must now take was a sufficient injury to provide standing.[126]

Enzor v. Rasberry.[127] Rasberry filed suit to extinguish Enzor's claim to a common law way of necessity across Rasberry's land. The trial court entered a final judgment quieting title to the disputed road, holding that Enzor had reasonable and practicable alternative means of ingress and egress to his property.[128] The First District Court of Appeal disagreed, reversed, and remanded.[129]

Section 704.01(1) of the *Florida Statutes* codifies the common law rule of an implied grant of a way of necessity where:

> a person . . . grants lands to which there is no accessible right-of-way except over his land . . . . Such an implied grant or easement in lands or estates exists where there is no other reasonable and practicable way of egress, or ingress and same is reasonably necessary for the beneficial use or enjoyment of the part granted or reserved. An implied grant arises only where a unity of title exists from a common source other than the original grant from the state or United States.[130]

123. *Id.* (citations omitted).
124. *Cook*, 648 So. 2d at 181.
125. *Id.* at 182.
126. *Id.* (Reynolds, J., dissenting).
127. 648 So. 2d 788 (Fla. 1st Dist. Ct. App. 1994).
128. *Id.* at 789.
129. *Id.* at 795.
130. FLA. STAT. § 704.01(1) (1993).

Once established, a way of necessity passes by each conveyance to subsequent grantees. The proponent of an implied grant of a way of necessity must establish three elements:

> (1) both properties must at one time have been owned by the same party, (2) the common source of title must have created the situation causing the dominant tenement to become landlocked, and (3) at the time the common source of title created the problem the servient tenement must have had access to a public road.[131]

Rasberry owned three parcels and sold two of them to a Mr. Adams, causing the conveyed parcels to become landlocked at the time when the third parcel, retained by Rasberry, had access to a public road. Enzor owned one of the parcels formerly owned by Adams, and, therefore, also obtained the way of necessity. He used this easement to reach another landlocked parcel he owned and used as a hunting camp. Later, the State of Florida, during construction of Interstate 10, condemned a portion of Rasberry's property and created a service road leading from a public road through part of Enzor's easement, but stopping short of Enzor's land. Enzor still had to use the end part of the easement to reach his property. The service road, however, did provide an alternate route for the initial part of the journey. Enzor made use of this new road. However, the State later transferred the road to Okaloosa County, which vacated it and quitclaimed the road to Rasberry. At that time, Rasberry gave Enzor permission to use what was formerly the service road to reach his parcels. Rasberry now wanted to revoke such permission, arguing that Enzor had another implied easement of necessity through the parcel kept by Adams when Adams sold one parcel to Enzor. Adams, however, obtained an easement from Rasberry when he purchased two parcels from Rasberry. Adams then sold one of those parcels to Enzor. When Adams conveyed one parcel to Enzor, it was not only accessible through the parcel retained by Adams, but it was also accessible through the easement over Rasberry's parcel. Therefore, there existed only one easement, the original one over Rasberry's land. Although a road was subsequently created across the parcel that Adams had retained, Enzor had no right to use it, and the road was not always usable.[132]

The First District Court of Appeal held that the original easement was still valid because the necessity which gave rise to it still existed.[133]

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131. *Enzor*, 648 So. 2d at 791 (citations omitted).
132. *Id.* at 794.
133. *Id.* at 795.

IX. EMINENT DOMAIN

A. *Condemnation*

Finkelstein v. Department of Transportation.[134] The Supreme Court of Florida considered the question, although it was not properly certified, "[w]hether evidence of environmental contamination is relevant and otherwise admissible in an eminent domain valuation trial" and answered in the affirmative.[135]

In this case the subject property was a gas station with petroleum contamination. In the valuation trial, the Department of Transportation ("DOT"), moved in limine to include evidence that the property was contaminated, but the trial court ruled that the proffered evidence of contamination due to the stigma that would attach to the property was not relevant because the contamination was being remedied under the Early Detection Incentive program, which would reimburse property owners for the costs of eliminating the problem. The property was then valued as if not contaminated.

The Fourth District Court of Appeal reversed, and the Supreme Court of Florida, in an opinion by Justice Wells, affirmed in part, but reversed in part.[136] Under the circumstances of the reclamation program, the property should have been valued as if clear of contamination. However, evidence that the existence of prior contamination would stigmatize the property, affecting its market value, would be relevant and admissible in a valuation trial if the proper predicate was laid. The court expressed concern over the prejudicial nature of evidence of contamination. In order to be admissible, the evidence of contamination must "have a basis in facts and data reasonably relied upon by experts in the field of real property valuation, section 90.704, Florida Statutes (1993), and pass the test of section 90.705(2), Florida Statutes (1993)."[137] Evidence of sales of comparable, contaminated property would provide an adequate factual basis. The supreme court agreed with the trial court that evidence of the cost of remediation should not be admitted where those costs were not to be born by the landowner.

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134. 656 So. 2d 921 (Fla. 1995).
135. *Id.* at 922.
136. *Id.* at 925.
137. *Id.*

Justice Anstead expressed his concern that the majority opinion was going too far, answering questions that had not been asked.[138] Quite prudently, he would have simply answered the question in the affirmative and awaited later cases to elaborate on issues of evidence and valuation.

Basic Energy Corp. v. Hamilton County.[139] The City of Jasper wanted to attract the prison industry for economic reasons, such as to provide jobs for local citizens and add to the City's revenues. Consequently, it commenced this condemnation action to acquire land which it would offer to donate to the state as a site for a state prison. The property owner challenged the taking, contending that the City had no authority to exercise eminent domain powers for this purpose. The landowner lost in the circuit court, but prevailed in the First District Court of Appeal. This was not a case which analyzed the limits of the eminent domain power, but rather focused on the limits of power granted to this particular governmental entity. The court noted that the City is granted power by the *Florida Constitution*[140] to perform municipal functions, but concluded that securing the construction or operation of a state prison did not fit within the scope of municipal function. Furthermore, the statutory grant of authority to construct and operate jails to municipalities[141] did not include authority to engage in prison construction or operation. A prison and a jail are not the same thing. A jail is a short-term lockup, holding prisoners awaiting trial or serving short sentences and operated by a city or county. A prison, on the other hand, is for long-term incarceration and is operated by the state.

Department of Transportation v. Manoli.[142] DOT appealed the amount awarded to the appellee as business damages after DOT took a portion of appellee's gas station as part of its highway widening project. The business was incorporated, but the appellee was personally the lessee of the gas station and worked there as an employee of the corporation. Appellee's expert convinced the trial court that the wages the appellee received should not be considered in calculating his business loss. His damages were calculated by deducting from gross income the cost of goods sold, wages, rent, and other operating expenses, but not the wages he received as an employee. Judge Klein, writing for the Fourth District Court of Appeal, concluded[143] that was incorrect. He noted that business

138. *Id.* at 926.
139. 652 So. 2d 1237 (Fla. 1st Dist. Ct. App. 1995).
140. FLA. CONST. art. VIII, § 2.
141. FLA. STAT. § 180.06 (1993).
142. 645 So. 2d 1093 (Fla. 4th Dist. Ct. App. 1994).
143. Judges Hersey and Gunther concurred.

damages are entirely based upon a statute,[144] not the constitution. Business damages are based on lost profits. To ignore the profits he had received, even in the form of wages, would inflate his damages. The court noted that the amount of lost profits is not the only way of computing business damages, but that when lost profits is the method used, the reasonable value of the self-employed owner's services must be deducted.

Downtown Square Assoc. v. Florida Department of Education.[145] In this condemnation action, the landowner sought fees for attorneys and experts. At the time that the litigation began, *Florida Statutes* section 73.092 provided:

> (1) In assessing attorney's fees in eminent domain proceedings, the court shall give greatest weight to the benefits resulting to the client [condemnee] from the services rendered.
>
> . . . .
>
> (2) In assessing attorney's fees in eminent domain proceedings, the court shall give secondary consideration to: (a) The novelty, difficulty, and importance of the questions involved. (b) The skill employed by the attorney in conducting the cause. (c) The amount of money involved. (d) The responsibility incurred and fulfilled by the attorney. (e) The attorney's time and labor reasonably required adequately to represent the client in relation to the benefits resulting to the client.
>
> . . . .
>
> (4) In determining the amount of attorney's fees to be paid by the petitioner, the court shall be guided by the fees the defendant would ordinarily be expected to pay if the petitioner [condemnor] were not responsible for the payment of fees and costs.[146]

The Fourth District Court of Appeal, in an opinion by Judge Polen,[147] decided that this list was exclusive, relying without elaboration on an earlier supreme court decision.[148] Consequently, the trial court erred when it considered factors outside the list, although the court did not specify what

144. FLA. STAT. § 73.071(3)(b) (1991).

145. 648 So. 2d 1265 (Fla. 4th Dist. Ct. App. 1995).

146. FLA. STAT. § 73.092 (1993), *amended by* Ch. 94-162, § 3, 1994 Fla. Laws 564, 566-67.

147. Chief Judge Dell and Judge Stone concurred.

148. Schick v. Department of Agric. & Consumer Servs., 599 So. 2d 641 (Fla. 1992).

those factors were. Because the trial court had been thoughtful enough to specify what the reasonable fees would have been had it not considered those additional factors, the Fourth District Court of Appeal simply reversed and ordered fees to be awarded on that basis.[149]

JFR Investment v. Delray Beach Community Redevelopment Agency.[150] After the City declared an area to be blighted and in need of rehabilitation, it created a community redevelopment agency ("CRA"). The CRA moved to take this land with plans to use it:

> for off street parking and two historic homes will be relocated there. One of these homes will serve as the CRA headquarters and the other is expected to house the Palm Beach County Historic Preservation Board. A walkway through the block will link the Old School Square with municipal offices and other structures to the west. . . . The parking facilities planned . . . will serve as overflow parking for the tennis center and the community center and also provide parking for offices to be located in the relocated historic houses.[151]

The landowner challenged the taking, claiming that it was being done for private rather than public use because the parking would be used for the benefit of private development. The Fourth District Court of Appeal, in this per curiam decision,[152] properly distinguished this case from *Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale*.[153] The court observed that this project "will end up with a combination public use, retail, office, and entertainment center that will need parking."[154] The record supported the conclusion that the parking provided on this land would primarily benefit the public usage.[155] The private benefit was incidental, and an incidental private use of taken land is permissible.

White v. Department of Transportation.[156] The landowner was a real estate broker. At the condemnation trial, he did not call an appraiser but offered his own testimony regarding the value of the property. On cross-examination, he was required to publish portions of an appraisal report, revealing that he had hired an appraiser, received that appraiser's report, and

149. 648 So. 2d at 1266.
150. 652 So. 2d 1261 (Fla. 4th Dist. Ct. App. 1995).
151. *Id.* at 1262.
152. Judges Stone, Warner, and Farmer concurred.
153. 315 So. 2d 451 (Fla. 1975).
154. 652 So. 2d at 1263.
155. *Id.*
156. 645 So. 2d 114 (Fla. 5th Dist. Ct. App. 1994).

did not call that appraiser as an expert. According to the Fifth District, this was reversible error because it might create the inference that he was concealing or covering up evidence harmful to his case. A brief opinion by Judge Griffin[157] pointed out the district court had, a decade earlier in *Sun Charm Ranch, Inc. v. City of Orlando*,[158] established a rule allowing a landowner to use the condemnor's expert only where such inference is carefully avoided. The rule was here applied with equal force against the condemnor.

B. *Inverse Condemnation*

Rubano v. Department of Transportation.[159] The Supreme Court of Florida, in an opinion written by Justice Anstead,[160] answered the following certified question in the negative:

> DID THE DEPARTMENT OF TRANSPORTATION ENGAGE IN A COMPENSABLE TEMPORARY TAKING OF ACCESS WHEN IT ELIMINATED PETITIONERS' DIRECT ACCESS TO A STATE ROAD BY PLACING PETITIONERS' PROPERTY ON A SERVICE ROAD, ELIMINATED A PROTECTED U-TURN AND REPLACED IT WITH ANOTHER U-TURN WHICH ADDED ONE AND ONE-HALF MILES OF TRAVEL TO REACH THE PROPERTIES, AND SEVERED THE CONNECTIONS FROM INTERSTATE 95 TO STATE ROAD 84?[161]

This case involved five separate inverse condemnation actions which were consolidated. The properties were all located in Broward County west of I-95 between Southwest 26th and 23rd Terrace on the north side of S.R. 84. Before the construction, the properties were accessed by eastbound traffic on S.R. 84 by making a u-turn. Traffic exiting the properties could get back on the eastbound lanes of S.R. 84 by another u-turn. During construction of a new bridge on S.R. 84 over I-95, a u-turn was eliminated so that eastbound traffic from S.R. 84 would have to go an additional mile and a half to reach the property and the property could not be directly

157. Judges Cobb and Peterson concurred.

158. 407 So. 2d 938 (Fla. 5th Dist. Ct. App. 1981).

159. 656 So. 2d 1264 (Fla. 1995).

160. Chief Justice Grimes and Justices Overton, Shaw, Kogan, and Harding concurred. Justice Wells also wrote a short special concurring opinion in which Chief Justice Grimes concurred.

161. 656 So. 2d at 1265.

reached from S.R. 84. It was now reached only through a service road. In addition, the construction eliminated an exit from I-95 to S.R. 84, so I-95 traffic could not reach the properties by that direct route. I-95 traffic would have to exit onto I-595 and then exit onto S.R. 84 which runs parallel to it.

The supreme court held that this did not constitute a compensable taking. It cited *Department of Transportation v. Gefen*[162] for the proposition that no one has vested rights to the maintenance of a public highway in any particular place.[163] Similarly, no owner has a vested right in the continuation of traffic flow past his property. In this case, access was not completely eliminated, not even temporarily. The petitioners just lost their most convenient means of access.

Justice Wells agreed with the court's analysis and conclusions, but was uncomfortable with the results.[164] With Chief Justice Grimes' concurrence, he called on the legislature to provide relief to the victims of long disruptions caused by road construction.

Weaver Oil Co. v. City of Tallahassee.[165] The lessee of a commercial gas station and convenience store enjoyed two points of access from the main street. As part of a road improvement scheme, the City took a strip of land along the frontage. The City also constructed a traffic control island on city-owned property. This island reduced the width of one access from forty-four to twenty-seven feet. In response, the lessee sought statutory business damages and won $94,000 in the trial court. The First District Court of Appeal reversed, but certified the following question concerning a 1987 Florida statute:

> DOES SECTION 73.071, FLORIDA STATUTES, PERMIT A CLAIM FOR STATUTORY BUSINESS DAMAGES FOR AN ALLEGED SUBSTANTIAL IMPAIRMENT OF ACCESS RESULTING FROM GOVERNMENTAL CONSTRUCTION ON EXISTING RIGHT-OF-WAY ABUTTING THE OWNER'S PROPERTY, WHERE NO LAND IS TAKEN?[166]

In an unanimous opinion written by Justice Overton,[167] the Supreme Court of Florida answered the certified question in the negative. A loss of

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162. 636 So. 2d 1345-46 (Fla. 1994).

163. 656 So. 2d at 1267-68.

164. *Id.* at 1271.

165. 647 So. 2d 819 (Fla. 1994).

166. City of Tallahassee v. Boyd, 616 So. 2d 1000, 1004 (Fla. 1st Dist. Ct. App. 1993).

167. Chief Justice Grimes, and Justices Shaw, Kogan, Harding, Wells, and Anstead concurred.

access can constitute a taking for which compensation is required even though no land is actually lost. The taking occurs when a landowner has suffered an unreasonable interference with the access to or from his property to an existing street. However, the loss of access must be substantial. The supreme court quoted from its earlier opinion in *Palm Beach County v. Tessler*[168] that, "the fact that a portion or even all of one's access to an abutting road is destroyed does not constitute a taking unless, when considered in light of the remaining access to the property, it can be said that the property owner's right of access was substantially diminished."[169] The facts in the case at bar did not support the conclusion that a taking had occurred and, consequently, business damages could not be recovered.

The court went on to provide some interesting dicta. It reiterated that the legislature had provided for business damages, available only when there has been a partial taking of land. The statute did not provide for business damages where there had been a partial taking of access, even though that required compensation. Although this case arose in conjunction with the condemnation of a strip of land, the basis for the business damages claim was the creation of the traffic island limiting access. Consequently, even if the loss of access had required compensation, the landowner would still not have been entitled to statutory damages for injury to the business.

Department of Transportation v. Gefen.[170] The landowner prevailed in the trial court in an action for inverse condemnation, but lost on appeal. She then filed a motion for appellate attorney's fees based upon *Florida Statutes*, section 73.131(2).[171] The statute provides for a condemning authority to pay appellate attorney's fees except in cases where the landowner had appealed unsuccessfully, and that was not the situation in this case. That statute had been interpreted to apply to inverse condemnation cases,[172] so it would appear at first glance that the landowner would be entitled to attorney's fees here. The supreme court disagreed. In unani-

168. 538 So. 2d 846, 849 (Fla. 1989).

169. *Weaver Oil Co.*, 647 So. 2d at 821-22 (emphasis omitted) (quoting Palm Beach County v. Tessler, 538 So. 2d 846, 849 (Fla. 1989)).

170. 636 So. 2d 1345 (Fla. 1994).

171. Section 73.131(2) provides in relevant part: "(2) The petitioner shall pay all reasonable costs of the proceedings in the appellate court, including a reasonable attorney's fee to be assessed by that court, except upon an appeal taken by a defendant in which the judgment of the lower court shall be affirmed." FLA. STAT. § 73.131(2) (1993).

172. County of Volusia v. Pickens, 435 So. 2d 247 (Fla. 5th Dist. Ct. App.), *review denied*, 443 So. 2d 980 (Fla. 1983); State Road Dep't v. Lewis, 190 So. 2d 598 (Fla. 1st Dist. Ct. App.), *cert. dismissed*, 192 So. 2d 499 (Fla. 1966).

mously denying the motion,[173] the court found, without elaboration, that an unsuccessful litigant should not recover appellate attorney's fees even if the appeal had been filed by the State. The court concluded that "a landowner claiming inverse condemnation is only entitled to appellate attorney's fees if the claim is ultimately successful."[174]

Department of Transportation v. Heckman.[175] A landowner seeking a building permit to construct an indoor gun range was required by the City of Oakland Park to convey a seven-foot strip in exchange for waiver of platting requirements. Later, the City conveyed the strip to the Department of Transportation for widening the highway. When the Department of Transportation later condemned additional portions of the owner's property for a drainage easement, the owners sued for compensation for the taking of the seven-foot strip, claiming inverse condemnation in that the City had been acting as an agent for the Department of Transportation when it had improperly required them to give up the land. The owners prevailed in the trial court, but the Fourth District Court of Appeal, in an opinion written by Judge Klein,[176] reversed, holding that there was no evidence of a direct agency relationship.[177] The court distinguished this case from out of state examples[178] in which the state agency was directly involved and thus

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173. Chief Justice Grimes, Justices Overton, Shaw, Kogan and Harding, and Senior Justice McDonald all concurred in the order. The author was not identified.

174. *Gefen*, 636 So. 2d at 1347.

175. 644 So. 2d 527 (Fla. 4th Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1194 (Fla. 1995). The original opinion, which appears at 19 Fla. L. Weekly D1926 (4th Dist. Ct. App. Sept. 14, 1994), differed from the final opinion only in that the following was deleted from the next to last paragraph of the original: "Nor are courts unwilling to compensate property owners for egregious conduct by local governments. *See, e.g.*, Town of Highland Beach v. Resolution Trust Corp., 18 F.3d 1536 (11th Cir. 1994), in which a verdict in excess of $30 million was affirmed against a town as a result of an unconstitutional regulatory taking of property" and the elimination of a footnote which stated: "We are aware that the property owners have a separate lawsuit pending against the city. Although the trial court found that the city acted improperly in this case, the city is not a party here, and our mention of that finding in this opinion is nothing more than a description of what the trial court found. Our conclusion does not require us to consider the propriety of the city's conduct." 19 Fla. L. Weekly at D1927 n.1.

The appellate review of the suit against the City appears as Heckman v. City of Oakland Park, 655 So. 2d 525 (Fla. 4th Dist. Ct. App. 1994), in which summary judgment was reversed due to the existence of a factual issue.

176. Judge Gunther concurred.

177. *Heckman*, 644 So. 2d at 529.

178. Roth v. State Highway Comm'n, 688 S.W.2d 775 (Mo. Ct. App. 1984); Gaughen v. Commonwealth Dep't of Transp., 554 A.2d 1008 (Pa. Commw. Ct. 1989); Orion Corp. v. State. 747 P.2d 1062 (Wash. 1987), *cert. denied*, 486 U.S. 1022 (1988).

liable for a taking and also because in none of those cases had the landowner conveyed the land to the agency.[179]

Nor did the court find there was agency by estoppel. The necessary elements of agency by estoppel are: "(1) that the principal manifested a representation of the agent's authority or knowingly allowed the agent to assume such authority; (2) that the third person in good faith relied upon such representation; and (3) that relying upon such representation such third person has changed his position to his detriment."[180] Therefore, DOT was not liable under agency theory for the City's prior demand for the seven-foot strip of land. Since the landowner's entire case against DOT was founded on agency theory, it could not prevail.

In Judge Stevenson's dissent, he noted that the opinion of the trial court was "well reasoned"[181] and found sufficient facts in the record to support the trial court's conclusion of fact that an agency relationship existed.[182] Once that had been established, the Department of Transportation, as the principal, would be responsible for the acts of its agent, the City.

Department of Transportation v. Zyderveld.[183] The Department of Transportation had filed a map of reservation pursuant to *Florida Statutes*, sections 337.241(2) and 337.241(3) for the planned realignment of a state road, but in 1990 the Supreme Court of Florida held that such reservations without compensation were unconstitutional[184] so the Department had withdrawn the map. In 1991, Zyderveld sued for inverse condemnation, arguing that he had suffered a temporary taking due to the filing of a map of reservation. The trial court granted summary judgment for the landowner on the issue of liability. The landowner had suffered a temporary taking, and proceeded to trial on the issue of damages. The jury returned a verdict of $375,000 for the temporary taking and $70,000 for severance damages. The Fifth District Court of Appeal reversed after finding three errors.[185]

First, the trial court had allowed the landowner's experts to testify about the appropriate compensation for a temporary taking of the entire property, but the Department of Transportation was prohibited from introducing evidence rebutting the claim that the entire parcel had been

179. *Heckman*, 644 So. 2d at 530.

180. *Id.* at 529 (quoting Carolina Georgia-Carpet & Textiles, Inc. v. Pelloni, 370 So. 2d 450, 451 (Fla. 4th Dist. Ct. App. 1979)).

181. *Id.* at 531.

182. *Id.*

183. 647 So. 2d 308 (Fla. 5th Dist. Ct. App. 1994).

184. *See* Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622 (Fla. 1990).

185. *Zyderveld*, 647 So. 2d at 309-10.

taken. Second, the trial court had relied upon an earlier precedent[186] to the effect that the filing of the map constituted a *per se* taking. The Fifth District had already receded, in an opinion approved by the Supreme Court of Florida,[187] from that holding and had adopted the rule that even where such a map of reservation had been filed the inverse condemnation claimant had the burden of showing that he had been deprived of all or substantial economic use of his property. Consequently, the landowner here was not entitled to summary judgment on the liability issue. Finally, the court had allowed the landowner's expert to testify on the issue of severance damages after testifying that the whole parcel had been taken. This was an error because severance damages are applicable only in the case of a partial taking.

Tampa-Hillsborough County Expressway Authority v. Harrell.[188] also dealt with the filing of a map of reservation pursuant to *Florida Statutes,* section 337.241. In condemnation proceedings, landowners of two parcels claimed additional damages based upon an earlier temporary taking of their property by the filing of a map of reservation. That claim was supported with affidavits stating that the recording of the map of reservation prevented them from developing additional dwelling units on the property, refinancing or selling the property although they had no plans to do any of those things and had continued to live on the property. The Authority appealed a judgment awarding damages and the Second District Court of Appeal reversed.[189] Noting that the Supreme Court of Florida had held that the recording of a map of reservation pursuant to section 337.241 of the *Florida Statutes* did not amount to a *per se* taking of property,[190] the court held these assertions were insufficient to meet the burden of proving loss of all economically beneficial or productive use.

Sarasota County v. Ex.[191] Mr. and Mrs. Ex had sought permits to build a condominium on their land. After being informed that the permits could be obtained only if a ten-foot strip of land was deeded to the county, they deeded the land to the county. This occurred in 1983. Mr. and Mrs.

186. Orlando/Orange County Expressway Auth. v. W & F Agrigrowth-Fernfield, Ltd., 582 So. 2d 790 (Fla. 5th Dist. Ct. App.), *review denied,* 591 So. 2d 183 (Fla. 1991).

187. Department of Transp. v. Weisenfeld, 617 So. 2d 1071 (Fla. 5th Dist. Ct. App. 1993), *approved,* 640 So. 2d 73 (Fla. 1994); *see also* Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 640 So. 2d 54 (Fla. 1994).

188. 645 So. 2d 1026 (Fla. 2d Dist. Ct. App. 1994).

189. *Id.* at 1027.

190. *See Tampa-Hillsborough County Expressway Auth.,* 640 So. 2d at 54.

191. 645 So. 2d 7 (Fla. 2d Dist. Ct. App. 1994), *review denied,* 654 So. 2d 918 (Fla. 1995).

Ex lost the land through judicial sale in 1987. In 1991, they brought this action against the County for compensation for the ten-foot strip on the theory that the conveyance had been involuntary, meaning that they had been coerced, and therefore amounted to inverse condemnation. Since eight years had passed between the conveyance and the filing of the action, the County raised the defenses of estoppel and the statute of limitations.

The Second District, in an opinion by Judge Altenbernd,[192] considered the proposition that, in the absence of a specific statutory period for inverse condemnation, the adverse possession statute of limitations is generally applied. The court however, concluded that it would not make sense in this situation because, unlike most inverse condemnation situations where the government is effectively adversely possessing the property, the landowners here validly deeded the property to the government. Since the government became the owner at that date, it could not be an adverse possessor. That reasoning was based upon the court's finding that the record would not support a claim that the deed was either void or voidable. However, the lack of reasoning for that conclusion, including that duress would be inapplicable, is troublesome. The district court did not decide which statute of limitations did apply. It reasoned that the longest possible statute of limitations period which might apply was seven years,[193] and that period had expired before Mr. and Mrs. Ex had filed this action.

City of Pompano Beach v. Yardarm Restaurant, Inc.[194] This case also involved a statute of limitations defense although the parties there agreed that the four-year statute should apply.[195] The City appealed a non-final order in an action finding the City liable for inverse condemnation of the restaurant's property. The Yardarm Restaurant is located on a parcel of land overlooking the Hillsborough Inlet with a view of the lighthouse. In 1972, the owners decided to expand their business by building a 165-unit hotel and marina on the lot. The City opposed the plan, and passed an ordinance imposing a ten-story height restriction on new buildings in Pompano Beach. Litigation challenging the restriction ensued over the next five years, resulting in the issuance of a building permit in 1977. By then, the restaurant was unable to finance the costs of construction on its own. The restaurant struggled to find financing, yet continued construction. In

192. Acting Judge Campbell and Judge Fulmer concurred.

193. 645 So. 2d at 10 (citing FLA. STAT. § 95.14 (1991)).

194. 641 So. 2d 1377 (Fla. 4th Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1197 (Fla.), *cert. denied*, 115 S. Ct. 2583 (1995).

195. FLA. STAT. § 95.11(3)(f) (1985); *see also id.* § 95.11(3)(p).

1985, the mortgagee foreclosed, and the restaurant filed a bankruptcy petition. When the stay was later lifted, the property was sold to the City.

This action was brought by the restaurant in 1987, alleging inverse condemnation due to the City's extended obstruction of the restaurant's attempts to build a hotel and marina. After prevailing in the trial court, the City lost on appeal. The exhaustive and well-reasoned opinion by Associate Judge Griffin[196] concluded that this did not amount to a taking because the activity complained of, the City's improper use of land use regulations, had been struck down by the court based upon a due process challenge.[197] Moreover, the inverse condemnation claim would be barred by the statute of limitations since the City's last action had taken place more than four years prior to the institution of this suit. The court rejected the restaurant's argument that the taking did not occur as long as the landowner continued to contest the City's invalid regulations.

Tinnerman v. Palm Beach County.[198] The landowner petitioned the County to rezone his property to general commercial with a special exception to permit his planned commercial development of the property as an office/warehouse. The county's planning and zoning board recommended the approval, subject to certain conditions, and then the Board of County Commissioners approved the petition but provided that: "No building permits . . . shall be issued until construction has begun for West Atlantic Avenue from Military Trial to Jog/Carter Road as a 6 lane section plus the appropriate paved tapers . . . ."[199] Because of this indefinite delay in being able to begin his project, the landowner sued for inverse condemnation.

The Fourth District Court of Appeal noted, in a per curiam opinion,[200] that some uses did not require a building permit, so this moratorium on building permits had not deprived this landowner of all use of his land. At most, there was only a temporary taking, but the extent of that taking would still be subject to speculation. The County's decision, although technically final after the County Commission vote, was still subject to alteration, variance, or modification and the landowner had made no effort to persuade the board to alter its decision nor any alternative

196. Associate Judges Cobb and Peterson concurred.

197. *Yardarm Restaurant, Inc.*, 641 So. 2d at 1388. These might amount to temporary takings and a basis for a successful claim under title 42, § 1983, of the *United States Code*, but the court was careful not to issue any advisory opinions on those possibilities.

198. 641 So. 2d 523 (Fla. 4th Dist. Ct. App. 1994).

199. *Id.* at 524.

200. Judge Gunther, Judge Stevenson, and Associate Judge Mickle concurred.

proposals which might have convinced the County to lift the moratorium. "Ripeness requires a firm delineation of permitted uses so that the extent of the taking can be analyzed."[201] Therefore, the inverse condemnation claim was not ripe.

The *Bert J. Harris, Jr., Private Property Rights Protection Act*,[202] which becomes effective on October 1, 1995, may turn out to be the most important piece of legislation this session and possibly this decade. The legislature has provided a remedy for situations which do not amount to a taking under existing state or federal law,[203] but in which a landowner has been "inordinately burdened" by the action of the State of Florida, one of its agencies, or one of its political subdivisions.[204] An "inordinate burden" is defined as a direct restriction or limit of an existing use or vested right so that landowner is permanently unable to attain the reasonable, investment-backed expectation in a way that is disproportionate in comparison to the burden on others.[205] The Act provides the procedures to be followed by a property owner in making a claim,[206] allows settlements, and provides for attorney's fees and costs.[207]

X. ENVIRONMENTAL LAW

Davey Compressor Co. v. City of Delray Beach.[208] Davey Compressor was sued by the City of Delray Beach for trespass, negligence, private nuisance, and strict liability, after Davey Compressor's chemical dumping at its worksite contaminated some of the City's wellfields. The jury awarded the City $3,097,488 for past damages plus $5,600,000 for estimated future response costs. The Fourth District Court of Appeal affirmed the past damages award but reversed on the future damages.[209] The issue before the court was whether the award for future restoration costs should be limited to a maximum equal to the value of the property.[210]

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201. 641 So. 2d at 526.
202. Ch. 95-181, 1995 Fla. Sess. Law Serv. 1311 (West).
203. *Id.* § 1(1), 1995 Fla. Sess. Law Serv. at 1311.
204. *Id.* § 1(3)(c), 1995 Fla. Sess. Law Serv. at 1312.
205. *Id.* § 1(3)(e), 1995 Fla. Sess. Law Serv. at 1312.
206. *Id.* § 1(4), 1995 Fla. Sess. Law Serv. at 1312.
207. Ch. 95-181, § 1(6)(c)(3), Fla. Sess. Law Serv. 1311, 1314 (West).
208. 613 So. 2d 60 (Fla. 4th Dist. Ct. App.), *review granted*, 626 So. 2d 204 (Fla.), *and decision approved*, 639 So. 2d 595 (Fla. 1994).
209. *Id.* at 63.
210. *Id.* at 61.

The court discussed the "restoration" rule, which states that damages for the wrongful injury of property are measured either by the diminution in value or the costs of repairing or restoring the property to its prior condition, whichever is less.[211] This rule does not allow restoration costs to be the measure of damages when this amount exceeds the value of the property. The rationale for the rule is to prevent overcompensation of plaintiffs.[212]

The court ruled here that the negligible risk of overcompensation did not justify limiting the City's damages to the value of its wellfields.[213] Therefore, defendants held liable for environmental torts involving government property may have to pay full restoration costs, even if this amount exceeds the value of the property. In a secondary issue of whether the City was the proper party to bring the suit, the court ruled in favor of the City. Although the state owns natural resources such as groundwater, the City has standing because it has the duty to supply safe drinking water to the residents.[214]

Legal Environmental Assistance Foundation, Inc. v. Board of County Commissioners.[215] This case came to the Supreme Court of Florida on a certified question from the United States Court of Appeal for the Eleventh Circuit.[216] The question certified was:

> UNDER EXISTING FLORIDA LAW, NOT LIMITED TO THE STATE'S EPA-APPROVED UNDERGROUND INJECTION CONTROL PROGRAM, WHERE A HOLDER OF AN EXPLORATORY WELL CONSTRUCTION AND TESTING PERMIT HAS MADE A TIMELY APPLICATION FOR AN INJECTION WELL OPERATING PERMIT, DOES THE CONSTRUCTION AND TESTING PERMIT CONTINUE IN EFFECT PAST ITS EXPIRATION DATE UNTIL THE FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION HAS ACTED ON THE PENDING APPLICATION?[217]

The Board of Commissioners of Brevard County had applied for an exploratory well construction and testing permit for testing at the Indian River. The County wanted to use the well for treated sewage disposal, with

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211. *Davey Compressor Co.*, 639 So. 2d at 596.
212. *Id.*
213. *Id.*
214. *Id.*
215. 642 So. 2d 1081 (Fla. 1994).
216. 10 F.3d 1579 (11th Cir. 1994).
217. *Id.* at 1584-85; 642 So. 2d at 1081-82.

a plan to inject the treated sewage underground. The County later filed a timely application for an operating permit. While the application was pending approval, the County was given verbal approval to begin using the well for sewage disposal. The Legal Environmental Assistance Foundation challenged such use in federal court, arguing the County was operating the well without having been formally granted the operating permit. The County argued that its timely application for the operating permit operated to continue its now expired permit for construction and testing, and that this permit allows for operation incident to testing.[218]

The Supreme Court of Florida held that such renewal of the construction and testing permit would only be valid for construction and testing, and not for a new and different function, which is operation. The two types of permits are different for a reason, and the applicable law, section 120.60(6) of the *Florida Statutes*, as well as *Florida Administrative Code*, section 17-4.090(1), cannot be construed to extend the expiration date of a construction and testing permit when an application for an operating permit has been submitted.[219]

XI. EQUITY

Alexdex Corp. v. Nachon Enterprises.[220] Nachon filed an action in county court to foreclose a construction lien. The landowner filed an action in circuit court challenging the county court's jurisdiction. The circuit court discharged the lien on the theory that by statute lien foreclosure actions must be brought in circuit court.[221] The Third District Court of Appeal reversed and its opinion was affirmed by the Supreme Court of Florida.[222]

It had long been established that a lien foreclosure is an action in equity. *Florida Statutes*, section 34.01(4), provides that: "[j]udges of county courts may hear all matters in equity involved in any case within the jurisdictional amount of the county court, except as otherwise restricted by the State Constitution or the laws of Florida."[223] Under this section, it appears that the lien foreclosure was properly commenced in county court if the amount did not exceed the jurisdictional amount. However, *Florida*

218. *Legal Envtl. Assistance Found., Inc.*, 642 So. 2d at 1082.

219. *Id.* at 1084.

220. 615 So. 2d 245 (Fla 3d Dist. Ct. App.), *review granted*, 626 So. 2d 203 (Fla. 1993), *and decision approved*, 641 So. 2d 858 (Fla. 1994).

221. *Id.* at 862-63.

222. *Id.* at 247.

223. FLA. STAT. § 34.01(4) (1993).

Statutes, section 26.012(2)(g), provides that circuit courts have exclusive original jurisdiction "[i]n all actions involving the title and boundaries of real property."[224] The Supreme Court of Florida concluded that foreclosure of a lien on real estate did involve the title and, therefore, fit within this exclusive jurisdiction.[225] So there appeared to be a conflict in the statutes for which the constitution did not provide a solution.

The supreme court looked to the legislative history and invoked the plain meaning approach to statutory construction, but it solved the dilemma by holding that the 1990 amendment to section 34.01(4) impliedly amended the inconsistent provisions of the earlier statute, section 26.012. The court concluded that, "the legislature intended to provide concurrent equity jurisdiction in circuit and county courts, except that equity cases filed in county courts must fall within the county court's monetary jurisdiction, as set by statute."[226] It went on to decide that satisfaction of the monetary limits would be determined in a lien foreclosure by reference to the debt, not the value of the property subject to the lien.

Justice Shaw, considering the unsigned majority opinion[227] to be "badly flawed in parts,"[228] wrote an opinion concurring in the result, but challenging the conclusion that a lien foreclosure involves the "title and boundaries" of real property as required by section 26.012(2)(g).[229] The conjunction "and" convinced him that both title and boundaries must be the subject of the action to fit within this section, but this lien foreclosure involved only title. Consequently, he would have preferred the supreme court to conclude that the lien foreclosure was properly filed in the county court because there was no conflicting statute giving exclusive original jurisdiction over this case to the circuit court.

The supreme court had thus finally settled the confusion over the foreclosure jurisdiction of the county court. Subsequent buyers and title insurers, who were in grave danger because they had a county court foreclosure in their chain of title, can breathe a sigh of relief. The next case, *Sea Breeze, Video, Inc. v. Federico*,[230] illustrates how this will be

224. *Id.* § 26.012(2)(g).

225. *Alexdex*, 641 So. 2d at 862.

226. *Id.*; *see* FLA. STAT. § 34.01(1) (Supp. 1990) (stating the necessary monetary amounts).

227. Chief Justice Grimes, Senior Justice McDonald, and Justices Overton, Harding, and Kogan concurred in the *per curiam* opinion. Justice Shaw concurred in the result only.

228. *Alexdex*, 641 So. 2d at 862.

229. *Id.*

230. 648 So. 2d 226 (Fla. 2d Dist. Ct. App. 1994).

applied to an injunction action. Still unanswered, however, is how this might translate into county court jurisdiction to hear quiet title actions. Apparently the county court would have jurisdiction because such actions would involve title or boundaries if the jurisdictional amount can be determined. How that would be done remains uncertain. Furthermore, it is worth noting that there is an Article V Task Force in existence which is expected to issue a report in December of 1995, and may spur further changes.

Sea Breeze, Video, Inc. v. Federico.[231] Sea Breeze sued Pinellas County in circuit court requesting a declaration that certain county ordinances were invalid and an injunction against their enforcement. The complaint alleged subject matter jurisdiction in the circuit court based on value of the business property exceeding $15,000. Sea Breeze sought review by mandamus of the circuit court's *sua sponte* transfer of the action to the county court. Although the petitioners conceded that county courts now have equitable jurisdiction, they argued that the new concurrent jurisdiction did not extend to injunctive relief. The respondents challenged the basis for the amount in controversy.

The Second District Court of Appeal held that county courts can now issue injunctions, under the reasoning of *Alexdex Corp. v. Nachon Enterprises, Inc.*[232] in which the supreme court held that the county and circuit courts have concurrent jurisdiction in equity over lien foreclosures. The district court stated that:

> [t]he circuit court's exclusive jurisdiction is invoked by a good faith allegation that the amount in controversy is within the jurisdictional amount. Where an action for declaratory and injunctive relief does not reach the threshold jurisdictional amount of the circuit court, a plaintiff may choose either court, each court having concurrent jurisdiction.[233]

Because the petitioners alleged the amount in controversy to be more than $15,000, the action should not have been transferred.

The court did not specifically address the issue of whether the amount in controversy in a declaratory and injunctive relief action is based on the value of the property involved, as alleged by the petitioners. However, in a footnote, the court did mention that federal diversity cases involving such

231. *Id.*
232. 641 So. 2d at 858.
233. *Sea Breeze, Video, Inc.*, 648 So. 2d at 228 (citations omitted).

relief have based amounts in controversy on the value of the right sought to be protected, the value of the right to be free of the particular regulation, not the entire value of the business.[234]

Koschler v. Dean.[235] On March 1, 1966, a warranty deed dated February 28, 1966 was recorded in the public records conveying the property at issue to "William H. Dean and Mary Dean, his wife." William and Mary were divorced at that time. On June 21, 1966, they remarried and remained legally married until William's death in 1990, but they did not live together. Only William lived on the property. Mary lived with another man, acting and holding herself out to be his wife. After William died, Mary and the man with whom she lived gave a mortgage to the Koschlers. The person who conducted the title search concluded from the record that title to the property vested in Mary as the surviving spouse of William. Mary and her boyfriend executed an affidavit stating that no one else had a legal or equitable interest in the property.

Meanwhile, unknown to the Koschlers, the personal representative of her late husband had begun an adversary proceeding in the probate division of the circuit court against Mary, challenging her interest in the property and seeking a declaration that she was not entitled to participate in William's estate as an heir. On the day before the closing of the mortgage transaction, the personal representative filed a notice of lis pendens against the property in the probate division of the circuit court. However, he did not record the notice of lis pendens in the official county records after obtaining a judgment divesting Mary of any interest in this property.

The personal representative sought, obtained, and brought this quiet title judgment against the mortgagees. The trial court held that the Koschlers were not "bona fide mortgagees for value" because if they had searched in the public records for the name of Mary's boyfriend, they would have found an affidavit falsely claiming that Mary was married to her boyfriend. The Second District Court of Appeal reversed, holding that this was not in the chain title to this property and did not have any bearing on the title.[236] The Koschlers were entitled to rely on the chain of title found in the official records unless they had actual knowledge of an adverse unrecorded right. The court stated that the fault lies with the personal representative for failing to record the notice of lis pendens in the public records at the time he began the litigation.[237] Merely filing the documents in the probate division of

234. *Id.* at 228 n.4.
235. 642 So. 2d 1119 (Fla. 2d Dist. Ct. App. 1994).
236. *Id.* at 1121.
237. *Id.*

the court does not constitute constructive notice to subsequent purchasers of real property, so they take without constructive notice.

XII. FORECLOSURE

A.J. Stanton, Jr., P.A. v. Ivey.[238] Stanton filed a mortgage foreclosure action against Ivey based on a $10,000 note and mortgage executed by Ivey in settlement of an attorney's fee dispute. Ivey had defaulted on the mortgage payments but asserted the defense of unclean hands, contending that he was not aware that Stanton had represented other clients with interests conflicting with his, thereby breaching his fiduciary duty.[239]

The trial court submitted the equitable issue of unclean hands to the jury. The Fifth District Court of Appeal saw this as a potential error, although judges can sometimes use advisory juries for guidance in equitable matters. However, the Fifth District Court of Appeal reversed the trial court's judgment in favor of Ivey based on other grounds. The evidence to support a finding of breach of fiduciary duty on the part of Stanton was sufficient to avoid enforcement of the mortgage. The mortgage and note arose from a fee dispute regarding Stanton's representation of Ivey in a divorce, and Stanton was unaware at the time he represented Ivey that those other clients in question had conflicting interests from prior dealings with Ivey.[240]

A Mortgage Co. v. Bowman.[241] This case involved the foreclosure of a VA mortgage. The foreclosure sale was set for July 8, 1993, but could not be held on that date because the bidding instructions could not be obtained from the VA in time. Section 3701 of the *United States Code*, and those that follow thereafter, require that bidding instructions be obtained from the VA before a foreclosure sale can occur. Otherwise, the VA can refuse to guarantee the loan. Because of the delay in issuing the instructions, the lender moved to reschedule the sale. The request was denied without explanation. The Fourth District Court of Appeal held that such refusal was an abuse of discretion, and reversed and remanded.[242]

Amos Fowler & Amylene, Inc. v. First Federal Savings & Loan Ass'n.[243] Amylene, Inc. and its president, Mr. Fowler, appealed a final

238. 645 So. 2d 1050 (Fla. 5th Dist. Ct. App. 1994).
239. *Id.* at 1051.
240. *Id.*
241. 642 So. 2d 123 (Fla. 4th Dist. Ct. App. 1994).
242. *Id.* at 124.
243. 643 So. 2d 30 (Fla. 1st Dist. Ct. App. 1994).

judgment of foreclosure entered in favor of First Federal. The appellants executed a note and mortgage to the lender in 1977, for $275,000 at ten percent interest. The purpose of the loan was to refinance a mortgage held on a sixty-five unit motel complex. The lender later approved Fowler's plan to convert the motel into a condominium, and Fowler began to sell the units subject to the mortgage. In 1985, the appellants stopped paying the mortgage, and the lender accelerated the loan and foreclosed. In July of 1985, the court appointed a receiver at the request of the lender.[244]

In 1992, after a one-day trial, the trial court entered final judgment of foreclosure in favor of the lender, in the amount of $606,449.51, well in excess of the original loan amount. This amount included $233,345.97 in unpaid principal, $243,556,84 in interest from December of 1984 until the date of the judgment on a per diem basis, $17,140.14 in late charges, $62,406.56 as costs, and $50,000 as attorney fees.[245]

The mortgage had a paragraph providing for interest to accrue on expenses the lender incurs to protect its interest when the borrower fails to perform the covenants and agreements contained in the mortgage. On appeal, the court held that this provision in the mortgage justified the disputed interest charges.[246] However, the appellate court reversed and remanded on the award of interest because the per diem was based on 360 and not 365 days per year, and it was not clear whether it was based on simple or compound interest.[247] Additionally, the court reversed the award of late charges because it should not have included charges for each month after acceleration.[248] The lender is only entitled to late charges accrued up until acceleration of the note. Similarly, the court reversed the $50,000 attorney fee award because it lacked competent, substantial evidence of both the services performed and the reasonable value of such services.[249] Apparently there was no transcript of the hearing on attorney fees.

Batchin v. Barnett Bank of Southwest Florida.[250] Mr. Batchin was the deceased mortgagor's heir. Barnett began foreclosure of the deceased's mortgage and attempted to serve the decedent, apparently unaware that he had died. Mr. Batchin advised the process server that his father, the mortgagor, was deceased. The return of service stated this. The bank

244. *Id.* at 32.
245. *Id.*
246. *Id.* at 32-33.
247. *Id.* at 33.
248. *Amos Fowler & Amylene, Inc.*, 643 So. 2d at 33.
249. *Id.*
250. 647 So. 2d 211 (Fla. 2d Dist. Ct. App. 1994).

subsequently served Mr. Batchin with a notice of deposition, at which he testified that he was the sole beneficiary under the decedent's will, and that the will had not yet been probated.

Despite this and other communications between Mr. Batchin and the bank through its attorneys, the bank's attorneys later attempted service by publication, and changed the name of the defendant in the foreclosure from the decedent to the decedent and all parties claiming interests by, through, under or against the decedent. Notice was published, and when no one responded, the court appointed a guardian ad litem, who filed an answer on behalf of the decedent. Final summary judgment was entered, and the property was sold to an individual.

Mr. Batchin then sought to enjoin the issuance of a certificate of title to the property, seeking a declaration that he was the owner of the equity of redemption, either as the heir under the will or under intestate succession. The court initially granted a temporary injunction but later vacated it.[251]

On appeal, the court held that service by publication was improper here because there had not been a diligent search for interested parties, especially since the same law firm had deposed the one interested party.[252] Because there had been no valid service of process, the foreclosure judgment was entered without authority. The court mentioned but left unresolved whether the judgment would be void or voidable.[253] The court said such a determination would be relevant when determining the rights of the purchaser at foreclosure sale.[254] However, the court noted that the purchaser in this case was not a bona fide purchaser because she had actual notice of Mr. Batchin's claim to the property one day before the certificate of title was to issue.[255] The bank would have to reforeclose and personally serve Mr. Batchin, or if unable to do so, file a more complete affidavit of diligent search.[256]

BSL Investors, II v. Downey Savings & Loan Ass'n.[257] The Fifth District Court of Appeal reversed a partial summary judgment entered in favor of the lender, holding the individual general partners of BSL Investors jointly and severally liable in the amount of $847,155.74.[258] Downey

251. *Id.* at 213.
252. *Id.*
253. *Id.*
254. *Id.*
255. *Batchin*, 647 So. 2d at 213.
256. *Id.*
257. 649 So. 2d 331 (Fla. 5th Dist. Ct. App. 1995).
258. *Id.* at 332.

Savings brought an action to foreclose the appellants' property, the Colony Plaza Hotel. The lender moved for summary judgment, and a hearing was set for October 7, 1993. On that date, in open court, the lender filed an "Emergency Motion for Turnover of Property to Receiver," claiming that BSL and its general partners had been siphoning the hotel "rents" during the eighteen months since the foreclosure action was commenced. The trial court entered summary judgment against BSL Investors and granted Downey's Motion for Turnover of Property in the amount of $847,155.74. Next, the court entered the disputed partial summary judgment holding the general partners jointly and severally liable for that amount, and authorized a writ of execution.[259]

The Fifth District Court of Appeal agreed with the appellants that the partial summary judgment should not have been granted because the lender never moved for such action and the procedure followed by the lender in obtaining the judgment was "so thoroughly defective as to constitute a denial of due process."[260]

County Collection Services, Inc. v. Allen.[261] County Collection Services brought a lien foreclosure action. However, the circuit court, having first granted summary judgment for the Collection Service, ultimately dismissed the case for lack of subject matter jurisdiction, finding the amount in controversy to be within the county court's jurisdictional amount.[262]

The subject lien arose from the property owner Allen's violation of the Palm Beach Zoning Code, resulting in a fine of $75 per day. The claim of lien was recorded on March 12, 1990 after the fines totaled $9900. On March 12, 1990, the jurisdictional amount in controversy limit for the county courts was $5000.[263] The relevant section of the *Florida Statutes*, section 34.01(1)(c), was amended in 1990 to provide for the increased amount in controversy currently in place for the county courts. The amended statute provides that the county court has subject matter jurisdiction "[a]s to causes of action accruing . . . [o]n or after July 1, 1990 . . . at law in which the matter in controversy does not exceed the sum of $10,000, exclusive of interest, costs, and attorney's fees, except those within the exclusive jurisdiction of the circuit courts."[264] The statute provides for a further increase of subject matter jurisdiction for causes of action accruing

259. *Id.*
260. *Id.*
261. 650 So. 2d 650 (Fla. 4th Dist. Ct. App. 1995).
262. *Id.* at 650.
263. *Id.*
264. FLA. STAT. § 34.01(1)(c)3 (1993).

on or after July 1, 1992, where the amount in controversy does not exceed $15,000, the current jurisdictional limit of the county courts.[265]

Because the jurisdictional limit was $5000 at the time that the claim of lien was filed, the Fourth District Court of Appeal held that the $9900 action was clearly not within the county court's jurisdiction, and should not have been dismissed by the circuit court.[266] The Fourth District Court of Appeal noted further that *Florida Statutes*, section 162.09(3), provides for continued accrual of the fine until judgment is rendered, so that the current amount of the lien would be well within the circuit court's jurisdiction.[267]

The court made no mention of the provision in section 34.01(1)(b) of the *Florida Statutes* which states that the county courts have original jurisdiction "[o]f all violations of municipal and county ordinances. . . ."[268] This provision seems to support the circuit court's dismissal for lack of subject matter jurisdiction. This was, after all, an action based on the violation of the Palm Beach County Zoning Code.

Although the action arose from violations of county ordinances, it was a foreclosure action. Foreclosure actions are in equity, and equitable jurisdiction was, at the time that the cause of action accrued, exclusively within the circuit courts. This seems to support the Fourth District Court of Appeal's holding that the action belonged in the circuit court, but the Fourth District Court of Appeal made no mention of this. It seems as though the court intentionally avoided any mention of equitable jurisdiction in its opinion.[269]

It was as recent as September 9, 1994 that the Supreme Court of Florida held that the county and circuit courts had concurrent jurisdiction in equity, in a decision which involved the jurisdictional statutes as amended effective October 1, 1990, after the cause of action had accrued in this case.[270] Therefore, the recent holding that the two courts have concurrent jurisdiction, if applied retroactively, would have affected the disposition of this action.

Dvorak v. First Family Bank.[271] First Family Bank foreclosed the Dvorak's mortgage, but two hours before the commencement of the foreclosure sale, the Dvorak's filed a Chapter 11 petition for bankruptcy.

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265. *Id.*
266. *County Collection Servs.*, 650 So. 2d at 650.
267. *Id.*
268. FLA. STAT. § 34.01(1)(b).
269. *Id.*
270. *Alexdex*, 641 So. 2d at 858.
271. 639 So. 2d 1076 (Fla. 5th Dist. Ct. App. 1994).

The bankruptcy was later converted to Chapter 7. Two years later, the bankruptcy trustee conveyed the mortgaged property to the Bank for $6000, the amount of equity that the Dvoraks had in the property. The bank then filed a motion in state court to amend its prior foreclosure judgment, requesting a new sale date and adding more attorney's fees and interest to the judgment amount.

The issue was one of first impression: whether a bank which purchases the mortgaged property from the debtor as part of the debtor's bankruptcy liquidation can subsequently continue its former foreclosure action and add the attorney's fees incurred due to the bankruptcy.[272]

The Fifth District Court of Appeal ruled en banc that attorney's fees for work before the bankruptcy court must be sought in the bankruptcy action against the appropriate fund being held in that court, as stated in title 11, section 506(b), of the *United States Code*. Failure to collect the fees through the bankruptcy action when the creditor's claim is oversecured, such as when there is money available for payment of fees, results in waiver of the fees. Because the claim was oversecured, the bank's failure to collect the fees through the bankruptcy action was held to constitute a waiver of the fees.[273] The court, in a footnote, however, commented that in certain circumstances, a state court has the power to award attorney's fees for a bankruptcy action.[274]

As footnote four mentions, it is also apparent that the bank, by purchasing the property from the trustee, discharged the Dvoraks.[275] The court stated that merger did not occur because of an anti-merger clause in the deed from the trustee. However, the purchase operated as a deed in lieu of foreclosure. Thus, the bank now owned the property subject to its own mortgage. It could foreclose itself to eliminate junior lienors, but it could not seek a deficiency against the original mortgagors.[276]

First Union National Bank of Florida v. Goodwin Beach Partnership.[277] First Union appealed a denial of a deficiency judgment because the trial court determined that the fair market value of the property exceeded the judgment at the time of the foreclosure sale. The final judgment amount was $4,986,487. First Union purchased the property at the foreclosure sale for the nominal sum of $1000 and moved for entry of a deficiency

272. *Id.* at 1077.
273. *Id.* at 1079.
274. *Id.* at 1079 n.8.
275. *Id.* at 1077.
276. *Dvorak*, 639 So. 2d at 1077.
277. 644 So. 2d 1361 (Fla. 5th Dist. Ct. App. 1994).

judgment. While still in the deficiency proceedings, First Union sold the property for $2.5 million. First Union used this sale amount, in addition to the tax assessed value of $3,106,500 and an appraisal using the income approach giving a value of $2.18 million, in support of its deficiency argument.[278]

Goodwin presented its own experts who arrived at values in the $5 million range using the comparable sales approach. The trial court declined to award a deficiency judgment, and specifically rejected any consideration of $124,953 in unpaid real estate taxes due as of the date of foreclosure sale, on res judicata grounds. The judge ruled that the unpaid taxes should have been included in the final judgment of foreclosure.[279]

The Fifth District Court of Appeal found this to be error.[280] Res judicata applies when there are two actions. Here, the deficiency was sought by motion within the same foreclosure action. "Section 702.06, Florida Statutes, authorizes entry of a deficiency decree, should a deficiency exist, in all suits for the foreclosure of mortgages."[281] Therefore, the delinquent taxes should have been considered in arriving at the fair market value for determining the deficiency.[282]

According to the lengthy dissent by Judge Sharp, this decision is in conflict with *Horne v. Smith*[283] and *Consales, N.V. v. Sunshine State Mortgage Co.*[284] Judge Sharp argued that even though claiming the unpaid taxes as part of the deficiency decree might not be barred by res judicata because the deficiency was sought within the same action, it should be barred because it was sought after the mortgagee became the owner of the property at the foreclosure sale. This proposition seems to be supported by the doctrine of merger and the *Statute of Quia Emptores*. First Union could have amended its foreclosure judgment to include the delinquent taxes, but failed to do so.[285]

Ginsberg v. Lennar Florida Holdings, Inc.[286] Appellant Ginsberg is the owner and operator of a property management firm. He is also the general partner of two limited partnerships which own apartment complexes

278. *Id.* at 1361.
279. *Id.* at 1362.
280. *Id.*
281. *Id.*
282. *First Union Nat'l Bank*, 644 So. 2d at 1362.
283. 368 So. 2d 392 (Fla. 1st Dist. Ct. App. 1979).
284. 639 So. 2d 170 (Fla. 3d Dist. Ct. App. 1994).
285. *First Union Nat'l Bank*, 644 So. 2d at 1367.
286. 645 So. 2d 490 (Fla. 3d Dist. Ct. App. 1994).

located in Broward County, Florida. The apartment complexes were managed by the appellant's property management firm. In 1988 both of the partnerships gave mortgages on the apartment complexes to Amerifirst. In 1991, the Resolution Trust Company ("RTC") acquired the mortgages as part of the liquidation of Amerifirst.

The appellees purchased the appellant's mortgages from the RTC after the RTC had already commenced foreclosure proceedings against the appellant, who had defaulted. Lennar subsequently obtained a foreclosure judgment and scheduled a foreclosure sale for January of 1993. The sale was stayed after the two limited partnerships sought protection under Chapter 11 of the Bankruptcy Code.

In March of 1993, Lennar filed a five-count complaint against Ginsberg. The counts consisted of conversion, waste, civil theft, violation of Florida's RICO statute, and violation of section 772.103(4) of the *Florida Statutes*, a conspiracy count. The counts related to Ginsberg and his management company's wrongful diversion of rents to Ginsberg's personal use. The loan documents gave Lennar a right to the rents from the apartment buildings. Ginsberg used delay tactics in responding to the complaint, and Lennar finally obtained a default judgment in August of 1993, after four tries. In January of 1994, Ginsberg moved to vacate the default judgment, arguing excusable neglect. The motion was denied and Ginsberg appealed.[287]

The Third District Court of Appeal rejected the excusable neglect argument, but vacated the default judgment on other grounds.[288] The court held that the complaint failed to set forth a viable cause of action and could not support a judgment even by default.[289] The reason for this was that the relationship between the parties was explicitly expressed in the loan documents, making the claims purely contractual in nature: "breach of contractual terms may not form the basis for a claim in tort. Where damages sought in tort are the same as those for breach of contract a plaintiff may not circumvent the contractual relationship by bringing an action in tort."[290] The court cited cases supporting the principle that purely economic losses are not recoverable in tort. This negated any claim for conversion, civil theft, and RICO. Lennar could not sue for waste because "[w]here the cause of action arises out of an injury to property, that action is personal to the owner of the property and a party who subsequently

287. *Id.* at 493.
288. *Id.* at 502.
289. *Id.* at 494.
290. *Id.*

takes title to the property, without receiving an assignment of that cause of action, may not pursue that cause of action."[291] The assignment of mortgage was silent regarding any waste cause of action held by the RTC. Furthermore, waste is a valid cause of action only when the property is rendered less valuable than the outstanding debt. There was no evidence of such impairment of security.[292]

Additionally, the court held that section 697.07, the assignment of rents provision, applies retroactively to the date of default.[293] The court, however, disagreed with Lennar's claim that under 697.07(3) the parties have the power to contract away their right to a written demand for the rents.[294] According to the court, a written demand for the rents is still a prerequisite. Furthermore, section 697.07 creates a lien for the rents after the written demand is made; the lien must be foreclosed before any right to possession of the rents arises. Therefore, Lennar had no right to the rents immediately upon default. The only action Lennar had the immediate right to bring was to pursue its remedies under the loan documents. Because Lennar had no possessory right to the rents, Ginsberg, the rightful possessor, could not steal them. Therefore, the theft, RICO, and conspiracy counts failed.[295]

Levine v. FDIC.[296] The Levines appealed a circuit court judgment holding that the FDIC, under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), could repudiate the deed in lieu of foreclosure agreement entered into by the Levines and their now insolvent and liquidated lender, First American Bank & Trust. The deed in lieu agreement covering three properties was very beneficial to the Levines. It allowed them to set the minimum prices for the lender's sale of the properties and provided that the Levines would potentially receive $500,000 from the sales proceeds of the three properties. The agreement also allowed the Levines to live rent free in one of the properties until sold. In May of 1988, First American sold two of the lots but refused to pay the Levines their share of the proceeds as agreed to in the deed in lieu agreement. The Levines sued.[297]

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291. *Ginsberg*, 645 So. 2d at 496.
292. *Id.* at 500.
293. *Id.* at 497.
294. *Id.* at 498.
295. *Id.* at 501-02.
296. 651 So. 2d 134 (Fla. 4th Dist. Ct. App. 1995).
297. *Id.* at 135.

First American was declared insolvent on December 15, 1989 and the FDIC was appointed receiver. The FDIC then notified the Levines that it was repudiating the 1987 agreement pursuant to section 1821(e) of FIRREA. The circuit court held that the repudiation provision, which became effective on August 9, 1989, nearly a year and a half after the deed in lieu agreement was executed, applied retroactively. This was the issue upon which the Levines based their appeal.[298]

The Fourth District Court of Appeal reversed, holding that the statute did not apply retroactively.[299] The court noted the tension between the two possible approaches, one being the presumption against retroactivity, and the other being the maxim that courts must apply the law in effect when a decision is rendered.[300] The decision was based on the Supreme Court of the United States' recent clarification of the conflict in *Landgraf v. USI Film Products*.[301] In *Landgraf*, the Court provided an analytical framework for determining whether a federal statute can be applied retroactively. First, the statute's legislative history is analyzed to determine whether Congress has stated the proper scope of application. If not, the statute must be analyzed to determine whether it will have "genuinely retroactive effect," such as impairing rights possessed when the party acted, increasing liability for past acts, or imposing new duties with regard to completed transactions. If so, a presumption against retroactivity applies.

In this case, the Fourth District Court of Appeal applied the above analysis, finding no congressional statement of the statute's proper scope, and then finding that the statute did have truly retroactive effect because it impaired the Levine's contract rights. Therefore, the court held that the presumption against retroactive effect applied.[302]

Morgan v. Kelly.[303] Morgan appealed a post-foreclosure deficiency judgment, claiming the trial court erred in entering a judgment for less than the amount due. Morgan was the foreclosing mortgagee, and obtained a foreclosure judgment of $387,087.28. He purchased the property at sale for $100,000. The court determined fair market value to be $215,000. The trial court determined the deficiency by subtracting the sales price from the fair market value, arriving at the judgment amount of $115,000. The Third

298. *Id.*
299. *Id.* at 138.
300. *Id.* at 136.
301. 114 S. Ct. 1483 (1994).
302. *Levine*, 651 So. 2d at 137.
303. 642 So. 2d 1117 (Fla. 3d Dist. Ct. App. 1994).

District Court of Appeal reversed, holding that the trial court applied an incorrect formula for arriving at the deficiency judgment.[304]

The correct formula for determining a deficiency judgment is the total debt, as secured by the final judgment of foreclosure (here, $387,087.28) minus the fair market value of the property as determined by the court.[305] Although the court has discretion in determining deficiency judgments, a departure from the above formula must be supported by a statement of legal or equitable justification. Otherwise, it is an abuse of discretion.[306]

Ocean Village Condominium Ass'n v. Brooks.[307] This case involved the foreclosure of a condominium association's lien for unpaid association dues. The lien amount was under $15,000 and the action was originally brought in the circuit court. The Third District Court of Appeal dismissed, holding that the circuit court lacked subject matter jurisdiction, and that the county court had exclusive jurisdiction in equity to hear the foreclosure.[308] The Supreme Court of Florida quashed the Third District Court of Appeal's decision based on the recent holding in *Alexdex Corp. v. Nachon*[309] that the county and circuit courts have concurrent jurisdiction in equity.

XIII. HISTORIC PRESERVATION

Metropolitan Dade County v. P.J. Birds, Inc.[310] Metro-Dade petitioned for a writ of certiorari to quash the circuit court's order which overturned the designation of part of Parrot Jungle in Miami as a historic site. The County, by local ordinance in 1990, declared a twelve-acre portion of Parrot Jungle a historic site because the property had achieved exceptional significance for over fifty years. The ordinance provides that generally properties must achieve significance during a period of over fifty years in order to be considered historic sites. This is known as the over fifty rule. Parrot Jungle qualified through the above described rule as well as through the exceptional significance exception which allowed a property to be considered if it has not been significant for over fifty years, but its significance has been exceptional. The County used this dual rationale

304. *Id.* at 1117-18.

305. *Id.* at 1117.

306. *Id.* at 1118.

307. 649 So. 2d 230 (Fla. 1995), *on remand*, 656 So. 2d 275 (Fla. 3d Dist. Ct. App. 1995).

308. Brooks v. Ocean Village Condominium Ass'n, Inc., 625 So. 2d 111, 112 (Fla. 3d Dist. Ct. App. 1993).

309. 641 So. 2d 858 (1994).

310. 654 So. 2d 170 (Fla. 3d Dist. Ct. App. 1995).

because it was uncertain as to which justification was necessary because the property had been in existence for over fifty years but significant structures had been built within the last fifty years.[311]

The owner of Parrot Jungle contested the County's determination, arguing that the standard of "exceptional importance" was undefined and that his procedural due process rights were violated.[312] The court disagreed, overlooking the fact that the County had based its designation on both alternatives (the over fifty rule and the under fifty exception) so that a lack of clarity in the "exceptional importance" standard would not be dispositive.[313] Furthermore, the standard was not vague because there were prior administrative law cases setting out recognized professional criteria for interpreting "exceptional importance." Besides, it is a determination which must be made on a case-by-case basis.[314] Judge Barkdull dissented, arguing that the court should have denied review.[315]

XIV. HOMESTEAD

King v. Ellison.[316] The Supreme Court of Florida answered the following certified question in the negative:

> WHETHER SECTION 732.401(1), FLORIDA STATUTES (1991), WHICH VESTS A REMAINDER INTEREST IN HOMESTEAD PROPERTY IN LINEAL DESCENDANTS, IS UNCONSTITUTIONAL WHEN APPLIED TO DEFEAT A TESTATOR'S INTENT TO DEVISE HOMESTEAD PROPERTY EQUALLY TO ADULT STEPCHILDREN AS WELL AS ADULT LINEAL DESCENDANTS?[317]

In so doing, the court found no conflict between section 732.401(1) and article X, section 4(c) of the *Florida Constitution.*[318]

Florence and Hubert Calhoun, a married couple each with children from prior marriages, purchased property in Indian River County. They both drew up their own wills, in which they bequeathed their entire estates

311. *Id.* at 173-74.
312. *Id.* at 172.
313. *Id.* at 175.
314. *Id.* at 178.
315. *P.J. Birds*, 654 So. 2d at 181 (Barkdull, J., dissenting).
316. 648 So. 2d 666 (Fla. 1994).
317. *Id.* at 667.
318. *Id.* at 668.

to each other. The wills each contained a provision that the one who lived longest would pass his property to the children and stepchildren. When Florence died, Hubert married Rosemarie, establishing homestead in the Indian River property. Hubert died two years later, leaving Rosemary as the surviving spouse. Because there was a surviving spouse and a homestead, and because article X, section 4(c), of the constitution does not allow homestead to be devised when the owner is survived by a spouse, the devise in the will was invalid. Section 732.401(1) governs the requirement that the surviving spouse receive a life estate in the homestead with a vested remainder going to the decedent's lineal descendants. In response to the stepchildren's claim that the statute constitutes an improper and unconstitutional restraint on alienation, the court responded that the statute does not restrict the right to devise homestead property, but merely states how homestead property will descend if it is not devised as permitted by the *Florida Statutes* or the constitution.[319] The constitutional provision restricts the right to devise homestead.[320]

Miami Country Day School v. Bakst.[321] The school obtained a money judgment against the Baksts for failure to pay tuition, and sought to enforce the judgment against the Baksts' residence, a houseboat. The trial court held that the houseboat qualified as homestead pursuant to article X, section 4, of the *Florida Constitution*, and section 222.05 of the *Florida Statutes*.[322] The Third District Court of Appeal affirmed.[323] The court restated that the homestead provision is to be broadly construed as a matter of public policy. Thus, a "dwelling house," as used (but not defined) in section 222.05, is now extended past the inclusion of mobile homes to houseboats.[324]

XV. INSURANCE

Preferred Mutual Insurance Co. v. Martinez.[325] Preferred issued a homeowner's policy to the Martinezes who subsequently filed a claim after Hurricane Andrew. The parties disagreed on the amount of the claim, and the Martinezes sued, arguing that Preferred failed to offer them the full

319. *Id.*

320. *Id.*

321. 641 So. 2d 467 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1195 (Fla. 1995).

322. *Id.* at 468.

323. *Id.* at 470.

324. *Id.* at 469.

325. 643 So. 2d 1101 (Fla. 3d Dist. Ct. App. 1994).

replacement value of their home. The policy stated that in the event of such a dispute, either party could demand an appraisal. The insurance company made such demand, but the trial court denied it, holding that the insurance company had waived this right by not demanding appraisal earlier in the negotiations. The Third District Court of Appeal reversed and remanded for entry of an order compelling appraisal.[326] The court held that such appraisal provisions, like arbitration clauses, are deemed to be conditions precedent to recovery under the insurance policies.[327]

XVI. LAND USE PLANNING

Equity Resources, Inc. v. County of Leon.[328] Leon County adopted an ordinance to insure that property owners' vested rights would not be lost by operation of the County's adoption of the 2010 Comprehensive Land Use Plan. Equity resources owned forty-seven acres: ten acres had already been developed; on thirty acres, permits for development had been issued and construction of multifamily housing had begun when the permits were revoked due to down-zoning;[329] and the remaining land was zoned commercial. Equity Resources and Richard Pelham, Equity's president and one of its co-owners, applied for a determination that their development rights had vested; however, the application was denied. Equity Resources then petitioned the circuit court for certiorari which was also denied. The First District Court granted certiorari and, in an extensive and well-reasoned opinion written by Chief Judge Zehmer,[330] the decision of the trial court was quashed.

The focus of the opinion was on "whether the trial court observed the essential requirements of the law in ruling on the petition."[331] The ordinance recognized equitable estoppel as a basis for granting a vested rights determination. Equitable estoppel based upon the actions of a zoning authority has the following elements: 1) a property owner's good faith reliance, 2) on some act or omission of the government, and 3) a substantial change in position or the incurring of excessive obligations and expenses so

326. *Id.* at 1103.

327. *Id.*

328. 643 So. 2d 1112 (Fla. 1st Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1194 (Fla. 1995).

329. Note that the down-zoning occured prior to the adoption of the plan. This has led to litigation in federal court. *See* Villas of Lake Jackson, Ltd. v. Lake County, 796 F. Supp. 1477 (N.D. Fla. 1992).

330. Judge Miner and Senior Judge Smith concurred.

331. *Equity Resources, Inc.*, 643 So. 2d at 1117.

that it would be highly inequitable and unjust to destroy the right he acquired.[332] The trial court erred by confusing these elements with the requirements of standing. The trial court had concluded that Equity Resources lacked standing because Pelham, not Equity Resources, was the one who had relied upon the government's position. Further, Pelham lacked standing because Equity Resources was now the owner. Pelham, as an indirect owner of the property, did have standing. Equity Resources, as a vehicle created and controlled by Pelham to invoke estoppel based upon Pelham's acts of reliance which a stranger successor would not.

The trial court had also ruled against the petitioners because "'there is no evidence they incurred expenses *exclusively for the undeveloped* portion of the property, because the expenditures were not made in reliance on any promise by the County and because the [Petitioners] waited far too long to complete the project.'"[333] The district court found that there was "no basis in law for this ruling."[334] There is no requirement that the claimant have incurred expenses exclusively for one particular piece of land; there is no requirement that the County have made any promise; and there is no requirement that development have been commenced within any particular time or a reasonable time.[335] The case was remanded to the trial court with directions to order the County to give further consideration to the original application in a manner consistent with the opinion.

City of Jacksonville v. Wynn.[336] Wynn and other property owners in a Jacksonville residential subdivision sued seeking a declaration that the City's comprehensive zoning plan was invalid as applied to their property. They also sought an injunction to prevent the City from imposing on their property any use classifications more restrictive than "neighborhood commercial," and claimed inverse condemnation.

The reason behind the property owners' opposition to the City's plan was that their six residential lots, five improved with single-family homes and one vacant lot, were zoned as "residential low density" in the City's plan. The property owners claimed that their lots had gradually become less conducive to residential use and that the best use for the property was now neighborhood commercial. The City refused to change its plan and the property owners argued that the zoning of their properties under the plan did

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332. *Id.* (quoting Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 479 (Fla. 1st Dist. Ct. App. 1975), *review denied*, 440 So. 2d 352 (Fla. 1983)).

333. *Id.* at 1119.

334. *Id.*

335. *Id.*

336. 650 So. 2d 182 (Fla. 1st Dist. Ct. App. 1995).

not bear a substantial relation to the public health, safety, morals, or general welfare, and was thus an invalid exercise of police power. The circuit court held that the plan failed to meet the requirements of chapter 163 of the *Florida Statutes*. It entered judgment in the property owners' favor with regard to all their claims except inverse condemnation, finding that the injunctive relief would prevent a taking from occurring. The First District Court of Appeal, in an opinion written by Judge Kahn,[337] reversed on two grounds.

First, the court determined that the circuit court lacked subject matter jurisdiction to hear the action.[338] Part II of chapter 163 of the *Florida Statutes* provides that an administrative hearing before the Division of Administrative Hearings is the sole method available for the determination of whether a local government's plan is in compliance with chapter 163.[339] The Division of Administrative Hearings has exclusive original jurisdiction over such challenges.[340] Even before such hearing is requested, the Department of Community Affairs must make an initial determination as to whether the plan is in compliance. This means that the circuit courts have jurisdiction to review the decisions of the Division of Administrative Hearings regarding the disputed plan, but cannot hear claims such as those made in the instant case which bypassed the administrative remedy.[341] The court explained that the rationale behind depriving circuit courts of subject matter jurisdiction to determine the validity of comprehensive plans is to prevent piecemeal changes to comprehensive plans from resulting, in effect, in spot zoning.[342] The legislature has decided that the administrative agency is better equipped to analyze the impact that individual changes might have on the overall plan.

The second basis for reversal was lack of ripeness. The landowners here did not know what uses the government might permit on their properties and they never submitted a development plan for the government to accept or reject. They never received a final determination of the permissible uses. It does not appear that a claim was made that such an attempt would be futile, and there does not seem to have been any basis for such a claim. Therefore, their taking claim was not ripe.

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337. Judges Ervin and Wolf concurred.
338. *Id.* at 185.
339. *Id.*
340. *Id.*
341. *Wynn*, 650 So. 2d at 185.
342. *Id.*

Metropolitan Dade County v. Blumenthal.[343] Blumenthal wanted to have his twenty-acre parcel to RU-4L (Residential Limited Apartment House with a maximum of twenty-three units per acre) rezoned so he could build a 360-unit apartment complex. The planned development would have eighteen units per acre. Nevertheless, a neighboring federation of homeowner associations objected, claiming that a trend had begun in the area to limit density to thirteen units per acre. The County Commission denied the rezoning application, agreeing that there was an emerging trend to limit density in the area and that the current application was inconsistent with that trend. Blumenthal successfully petitioned the circuit court for a writ of certiorari. The circuit court held that the Commission lacked substantial competent evidence because the neighbor's testimony was conclusory and lacked adequate support. The County then sought review by a petition for a writ of certiorari to the district court.

The Third District Court of Appeal denied the writ. The court noted[344] that the standard of review is narrow in such cases and the district court should determine two things: whether procedural due process was afforded, and whether the circuit court applied the correct law. Procedural due process was not raised as an issue and the district court ruled that the circuit court had applied the correct law. It refused to reconsider the question of whether the commissioner presented substantial competent evidence because to do so would be to exceed the proper scope of review.

Judge Cope wrote a lengthy dissent to the effect that the circuit court had applied incorrect law which may be characterized as follows. First, the circuit court reviewed the remarks of an individual commissioner. The circuit court should have determined whether the Commission's resolution was based upon substantial competent evidence rather than on whether the comments of an individual commissioner were based upon such evidence. Second, based upon the facts in this record, the Commission had a choice of alternatives. The fact that the circuit court would not have made the same choice should not have been the question because there was sufficient evidence in the record to support the choice that the Commission made. Third, the circuit court's denigrating characterization of the testimony was unwarranted. The court noted that, "[t]he citizen testimony in this case was fact-based, and perfectly proper. In reality, there was no dispute as to the material facts of the case in any event."[345] Fourth, the majority has applied the scope of review for administrative decisions, rather than the

343. 20 Fla. L. Weekly D1445 (3d Dist. Ct. App. June 21, 1995).

344. Judges Hubbart and Goderich concurred in the *per curiam* opinion.

345. *Blumenthal*, 20 Fla. L. Weekly at D1449.

review which a district court may exercise over a circuit court decision. The district court may determine whether the law has been correctly applied to the facts in the record. Fifth, the majority has made a factual error about the record.[346]

City of Punta Gorda v. Burnt Store Hotel.[347] The City appealed an order determining that a capacity increase fee was actually an illegal tax. The issue arose from a utility contract between the City and Burnt Store, which had purchased an existing hotel already connected to the City's water and sewer system. As a new utility customer, Burnt Store was required to sign an agreement to pay for increases in average consumption. Due to increased consumption, Burnt Store was charged $154,000. The City argued that the costs of increased consumption should be charged to the party responsible for the increased consumption. Burnt Store argued that because the newly acquired property had not been changed structurally and had existed in the same capacity under prior ownership, there was no new increase for which the City had not previously accounted.

The district court affirmed[348] the lower court's ruling that this was an illegal tax. It stated that impact fees are justified when there is a nexus between new construction and a population increase which leads to increased consumption. This affects the infrastructure and requires an additional capital expenditure.[349] A change in the ownership of an existing business does not provide the required nexus even though the continuation of the business results in increased usage. In dicta, the court reaffirmed the proposition that structural changes alone are insufficient to justify an impact fee when there is no showing of additional usage.[350]

Sarasota County v. Webber.[351] Webber sought a variance so he could build a home within the protected Gulf Beach Setback Line. The Board of County Commissioners initially approved the variance by a 3-2 vote.

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346. The majority stated that a citizen had testified about a trend and that the Commission had based its decision on the existence of that trend even though the citizen was not an expert qualified to testify about such trends. However, the only time the word "trend" appears in the record is in the remarks of a County Commissioner at the conclusion of the hearing. The resolution made no mention of any such trend as being the basis for the Commission's decision.

347. 639 So. 2d 679 (Fla. 2d Dist. Ct. App. 1994).

348. Judge Blue wrote the opinion. Acting Chief Judge Schoonover and Judge Threadgill concurred. *Id.*

349. *Id.* at 680.

350. *See* City of Tarpon Springs v. Tarpon Springs Arcade Ltd., 585 So. 2d 324 (Fla. 2d Dist. Ct. App.), *review denied*, 593 So. 2d 1051 (Fla. 1991).

351. 658 So. 2d 1069 (Fla. 2d Dist. Ct. App. 1995).

However, after a recess, one commissioner claimed a mental lapse and moved to reopen the matter. The Board voted again and, this time, denied the variance. Webber, claiming a violation of Florida's Government in the Sunshine Law and a denial of procedural due process, sought certiorari review in the circuit court which reversed the board. The Board and the County brought this petition for a writ of certiorari in the district court which held that the circuit court had erred by failing to determine whether the Board's denial of the variance was supported by substantial, competent evidence. Furthermore, the circuit court had applied the incorrect law in assigning error to the Board's reconsidering a matter after having voted. The Board properly followed the requirements of parliamentary procedure[352] and satisfied the requirements of procedural due process. The district court found no evidence in the record of any violation of the Government in Sunshine Law.

3299 N. Federal Highway, Inc. v. Broward County.[353] This case was primarily a First Amendment case dealing with the free speech issue of regulating nude dancing, but one novel issue relating to real property law was unsuccessfully raised. The bar argued that the Broward County Adult Entertainment Code, because it affected land use within the meaning of section 125.66 of the *Florida Statutes*, was subject to the zoning and land use ordinance requirements of notice and public hearings.[354] The Fourth District Court of Appeal held[355] that the legislature intended to impose those requirements only when an ordinance's effect on land use might be substantial, meaning that it must be more than merely an incidental effect on the use of land.[356] Ordinances which require minimum distances between residential areas and liquor establishments, or set moratoria on building, or prohibit the keeping of horses, do affect the use of land. On the other hand, ordinances which change building codes are not considered to affect land use because their effect is incidental.[357]

In this case, the county ordinance sets a minimum distance between the audience and nude performers. The court held that this is a regulation of

352. The motion to reconsider was made by a member of the original majority and only a short time had passed between the votes. The applicant's attorney was still present in the hearing room when the announcement was made. Apparently, there was no further discussion or testimony. *Id.*

353. 646 So. 2d 215 (Fla. 4th Dist. Ct. App. 1994).

354. *Id.* at 222.

355. Judges Glickstein and Warner concurred in the *per curiam* opinion. Judge Gunther concurred specially without opinion.

356. *Id.* at 224.

357. *Id.*

conduct, not land use, although it may necessitate some structural changes in the interior of the buildings. Regulation of land use was not the primary goal of the ordinance. Any such effect was incidental and not sufficient to trigger the notice and hearing requirements.[358]

The bar filed a motion for rehearing which the district court denied, but the court[359] certified the following question as being of great public importance:

> IS AN ORDINANCE THAT REQUIRES MODIFICATIONS TO ONLY THE INTERIOR STRUCTURE OF A BUILDING AN ORDINANCE THAT "AFFECTS THE USE OF LAND" WITHIN THE MEANING OF SECTION 125.66, FLORIDA STATUTES?[360]

Florida Land Use and Environmental Dispute Resolution Act.[361] This act, which becomes effective October 1, 1995, provides, "(3) Any owner who believes that a development order . . . or an enforcement action of a governmental entity, is unreasonable or unfairly burdens the use of his real property, may apply within 30 days after receipt of the order or notice of the governmental action for relief under this section."[362] The relief cited consists of a hearing before a special master[363] or, for a landowner who has been denied an application for an amendment to a comprehensive plan, mediation or other alternative dispute resolution.[364]

The Florida Legislature also amended section 177.142 of the *Florida Statutes*,[365] authorizing local governments to change the name of any subdivision, street, plat or other name appearing on an official plat or map, and even on any unofficial map or plat maintained by the clerk of the circuit court, if it finds that the name constitutes an ethnic or racial slur.

XVII. LANDLORD AND TENANT

Flanigan's Enterprises, Inc. v. Barnett Bank of Naples.[366] Flanigan's subleased its bar and sold the bar's furnishing and liquor license to the

358. *3299 N. Federal Highway, Inc.*, 646 So. 2d at 224.
359. Judges Glickstein, Gunther and Warner concurred in this *per curiam* opinion.
360. *3299 N. Federal Highway, Inc.*, 646 So. 2d at 228.
361. Ch. 95-181, § 2, Fla. Sess. Law Serv. 1311, 1315 (West).
362. *Id.* at 1316.
363. *Id.* § 2 (5)-(29).
364. *Id.* § 4 (amending FLA. STAT. § 163.3181).
365. Ch. 95-176, § 2, Fla. Sess. Law Serv. 1305, 1305 (West).
366. 639 So. 2d 617 (Fla. 1994).

subtenant. Under the sublease, Flanigan's had a security interest in the liquor license. The subtenant later granted a security interest in the liquor license to Barnett Bank. Barnett Bank recorded, but Flanigan's did not. Therefore, Flanigan's apparently could not claim priority based upon the security interest. Flanigan's advanced a different theory. It claimed to have a statutory landlord's lien,[367] which was prior to Barnett's security interest and, therefore, the subtenant's sale of the license gave rise to a statutory action for damages for disposing of personal property that was under a lien.[368]

The Supreme Court of Florida, in an opinion written by Justice Shaw, rejected this claim. The court had recently held a liquor license was not personal property to which a landlord's lien could attach.[369] Although the liquor license was represented by a certificate which the licensee was required to locate on the property, the certificate was not the license. Lacking a lien on the property, the damage theory was fatally defective.

American Linens, Inc. v. Venmall International Group.[370] The landlord brought an action for breach of the lease. The trial court found that the tenant owed $5325 in back rent and taxes, but that it was otherwise entitled to a return of its $12,834 security deposit. The tenant appealed, *inter alia*, the denial of prejudgment interest on the security deposit. The Third District Court of Appeal reversed on this point,[371] holding that interest should have been awarded from the date that the tenant demanded the return of its security deposit because the claim for $7509 was a liquidated contractual claim which became due upon demand.

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367. *Id.* at 618.

> Landlord's lien for rent. Every person to whom rent may be due, his heirs, executors, administrators or assigns, shall have a lien for such rent upon the property found upon or off the premises leased or rented, and in the possession of any person, as follows:
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> . . .
>
> Upon all other property of the lessee or his sublessee or assigns, usually kept on the premises. This lien shall be superior to any lien acquired subsequent to the bringing of the property on the premises leased.

FLA. STAT. § 83.08 (1977).

368. *Id.* § 818.01.

369. *Flanigan's*, 617 So. 2d at 618 (citing Walling Enters., Inc. v. Mathias, 636 So. 2d 1294 (Fla. 1994)).

370. 645 So. 2d 1059 (Fla. 3d Dist. Ct. App. 1994).

371. *Id.* at 1060. Judges Hubbart, Baskin, and Green concurred in the per curiam opinion.

Anderson v. Fiocchi.[372] The tenant cut his hands trying to open a glass shower door in a leased mobile home. The shower door, which would not open with ordinary pressure and was made of plain glass instead of safety glass, as required by the building code. The door had been installed before the current landlords purchased the property. The trial court granted summary judgment for the landlords, holding that they were not liable because they had no duty to determine what type of glass was in the door. The Second District Court of Appeal reversed. Judge Blue's opinion[373] agreed with the trial court to a limited extent. If the sole basis for the claim was based upon the glass used in the shower door, the plaintiff would lose. However, the plaintiff testified in his deposition that he had complained about the sticking door to the landlords' agent. The Supreme Court of Florida has stated, "[a]fter the tenant takes possession, the landlord has a continuing duty to exercise reasonable care to repair dangerous defective conditions upon notice of their existence by the tenant, unless waived by the tenant."[374] There was a genuine issue of material fact as to whether the door was opening and closing properly, and whether the landlord was on notice of its defective condition. Therefore, the motion for summary judgment should not have been granted.

Lynch Austin Realty, Inc. v. Engler.[375] The tenants apparently operated a consignment business. After defaulting on the lease, owing $45,000 in unpaid rent, they removed $55,000 in inventory, fixtures, and equipment regularly kept on the premises. The landlord brought an action for tortious interference with a commercial landlord's lien, distress for unpaid rent, and violation of the landlord's lien rights. The landlord also appealed a final judgment in favor of the corporate tenant's guarantors.

The tenants claimed that more than half of the removed items had not been paid for and were therefore subject to claims of their suppliers. The trial court held that the suppliers' claims were superior to the landlord's, and also absolved two of the four guarantors of liability. The Second District Court of Appeal reversed on the issue of the suppliers' superior claims. Under section 83.08(2) of the *Florida Statutes*, the landlord had a lien for unpaid rent "upon all other property of the lessee or his sublessees or assigns, usually kept on the premises."[376] The lien would attach either at

372. 640 So. 2d 275 (Fla. 2d Dist. Ct. App. 1994).

373. Associate Judge Campbell and Judge Schoonover concurred.

374. *Anderson*, 646 So. 2d 276 (quoting Mansur v. Eubanks, 401 So. 2d 1328, 1330 (Fla. 1981)).

375. 647 So. 2d 988 (Fla. 2d Dist. Ct. App. 1994).

376. FLA. STAT. § 83.08(2) (1991).

the time of the commencement of tenancy or when a chattel was brought on the premises, whichever was later, and would be superior to a subsequently created chattel lien. Based on the *Uniform Commercial Code*,[377] the landlord's lien would not have to be recorded to have priority over a subsequently acquired security interest or lien. However, under the *Uniform Commercial Code*,[378] the suppliers must give some form of public notice that they retained an interest in the goods. Since there was no evidence that the suppliers had perfected their claim by giving notice, the landlord's lien had priority.

Premici v. United Growth Properties, L.P.[379] The shopping center tenant stopped paying rent after a sewage system malfunctioned and damaged the leased premises. The tenant sued the landlord for damages. The landlord counterclaimed for eviction and back rent plus interest and moved to bifurcate the actions in order to expedite its summary action for possession. The trial court granted the landlord's motion.

The tenant asserted several defenses, including constructive eviction. The landlord then filed a "Motion for Determination of Rent Due and Payment of Rent Into Registry of Court," pursuant to the new procedure established by section 83.232 of the *Florida Statutes*. The court ordered the tenant to pay $28,886.35 to the registry of the court. When the tenant did not comply, the landlord moved for and won a default judgment on its possession claim on the theory that the tenant's failure to pay the rent due into the registry of the court constituted a waiver of all defenses. The landlord then moved for entry of final judgment on the money damages claim alleging that the default judgment for possession constituted an admission by the tenant of all the landlord's allegations. The trial court agreed and entered final judgment for damages.

The tenant appealed and the Fifth District Court of Appeal reversed.[380] The court held, in the opinion written by Judge Griffin,[381] that the failure to make court-ordered rent payments into the court registry waived all defenses only in the action for possession. The legislative history revealed that the statute was intended to prevent commercial tenants from having the benefits of continued possession during litigation without paying rent. The court then utilized the purpose approach to overcome the inadequate draftings found in this statute and concluded that the evil feared

377. *Id.* § 679.104(2).
378. *Id.* § 672.326(3).
379. 648 So. 2d 1241 (Fla. 5th Dist. Ct. App. 1995).
380. *Id.* at 1244.
381. Judges Cobb and Sharpe concurred.

would be eliminated by applying this section only to the action for possession.[382] That interpretation would be consistent with the interpretation of the similar residential statute.[383]

Thor Bear, Inc. v. Crocker Mizner Park, Inc.[384] The tenant leased space in a shopping complex for the purpose of operating a retail movie video store. He paid $75,000 as a security deposit and spent about $160,000 on improvements. The store failed a little more than a month after it was occupied due to lack of business. The tenant blamed the problem on inadequate parking and access. He had raised these issues with the lessor during the lease negotiations and before occupying the building. However, the lessor had repeatedly reassured him that his needs would be accommodated. The existence of a parking problem was well established, having, *inter alia*, been the subject of newspaper coverage.

The tenant sued, claiming about $400,000 in losses and alleging constructive eviction and fraudulent misrepresentation. The jury returned a verdict for the tenant. However, the verdict was rejected by the trial court which granted a belated directed verdict in favor of the lessors. The tenants appealed.

The district court, in a *per curiam* opinion,[385] recognized that the verdict should not have been set aside if a reasonable jury could have reached that verdict. The court then set out the elements for fraudulent misrepresentation:

> (1) a false statement or misrepresentation of a material fact; (2) the representor's knowledge at the time the misrepresentation is made that such statement is false; (3) such misrepresentation was intended to induce another to act in reliance thereon; (4) action in justifiable reliance on the representation; and (5) resulting damage or injury to the party so acting.[386]

The court then concluded that a reasonable jury could have concluded from the evidence in the record that these elements were satisfied.[387]

The general rule of law is that the false statement of fact must concern a past or existing fact to be actionable. But that rule is subject to an

382. *Premici*, 648 So. 2d at 1243.

383. *See* K.D. Lewis Enters. Corp. v. Smith, 445 So. 2d 1032 (Fla. 5th Dist. Ct. App. 1984).

384. 648 So. 2d 168 (Fla. 4th Dist. Ct. App. 1994).

385. Judges Hersey, Glickstein and Klein concurred.

386. *Thor Bear*, 648 So. 2d at 172 (citations omitted).

387. *Id.*

exception: a promise of future action made with no intention of performing or with a positive intention not to perform is also actionable. In effect, the fact which is the subject of the fraud is the promisor's intention. There was testimony that the lessor's vice president told the tenant that additional parking would be added when the leasing trailer was removed. However, the vice president's successor told the tenant such additional parking was never planned. A reasonable jury could infer from that evidence that the landlord had made a false statement or misrepresentation of a material fact. In addition, the lessor's vice president made statements that the needs of the tenant could be accommodated. Such an assertion made by one with superior knowledge or who appeared to have superior knowledge could constitute a false statement or misrepresentation of a material fact rather than merely an opinion. Furthermore, a reasonable jury could have decided that the tenant's reliance on the vice president's assertions was reasonable under the circumstances. Consequently, a directed verdict should not have been granted.

Walgreen Co. v. Habitat Development Corp.[388] This case involved a long-term commercial lease of the Walgreen building, a landmark in downtown Miami. The landlord sought a declaration on the meaning of the lease's surrender clause which required that the property be returned "in a 'safe condition and reasonably in good order and repair.'"[389] The parties and the trial court agreed that the phrase was clear and unambiguous and, therefore, should have been given its plain meaning. However, then the trial court construed that language to require the tenant to return the property "in tenantable and rentable condition so that the premises are returned in reasonably like-new or nearly-new condition, safe and fit for immediate occupancy and rental."[390] The Third District Court of Appeal reversed,[391] holding that the trial court had gone far beyond what the words expressed since "reasonably good repair" did not imply like-new or nearly-new condition.[392]

Furthermore, the trial court held that to be in a safe condition, the property would have to be in compliance with the building code at the time of the surrender.[393] The district court held that the order would have to be amended to provide, in essence, that the building not be in violation of

388. 655 So. 2d 164 (Fla. 3d Dist. Ct. App. 1995).
389. *Id.* at 165 (quoting article 27 of the lease agreement).
390. *Id.*
391. Judges Hubbart, Levy and Goderich concurred in the per curiam opinion.
392. *Id.* at 165.
393. *Id.*

the code, considering any exemptions or grandfathering-in which would be applicable to the building.[394]

TCY, Ltd., Inc. v. Johnson.[395] This circuit court decision merits attention. The defendant rented a boat slip at the plaintiff's marina. Alleging breach of the lease,[396] the plaintiff filed a residential eviction action in state court under chapter 83 of the *Florida Statutes*. Among the defenses was a challenge, which Circuit Court Judge Linda Singer Stein rejected, to the court's jurisdiction based upon the theory that such an eviction fell within the exclusive admiralty jurisdiction of the federal court. For a contract to fall within admiralty jurisdiction, it must "relate to the ship as an instrument of commerce."[397] In this case, the defendant's boat was moored to the dock, remained stationary, and was used exclusively as defendant's residence. Thus, it had been withdrawn from commerce and an action for possession of the slip where it was moored did not fall within admiralty jurisdiction.

XVIII. LEGISLATION

The *Homebuyer's Protection Act*[398] broadens the protections provided against unscrupulous contractors. The act provides that contractors must now at all times, not merely in hurricane situations, apply for permits within thirty days of receiving more than ten percent of the total contract price for any construction work on residential properties. Additionally, for construction of completed homes, the deposit money must be placed in an escrow account. All withdrawals from the escrow account require the signatures of both the buyer and the contractor. The contractor must begin work within ninety days from the issuance of permits unless the person ordering the work agrees in writing to extend the period. A contractor who receives payment in excess of the work already completed cannot fail to perform any further work for any ninety-day period. The Act provides a procedure for giving thirty-days notice to contractors when work has halted for sixty days.

Section 489.1265 of the *Florida Statutes* was amended to prohibit contractors from allowing non-licensed persons to use the contractors'

394. *Walgreen Co.*, 655 So. 2d at 165-66.

395. 3 Fla. L. Weekly Supp. 72 (11th Cir. Jan. 18, 1995).

396. Plaintiff alleged breach of the lease by failing to comply with the marina's rules and regulations and § 83.52 of the *Florida Statutes*.

397. *TCY, Ltd., Inc.*, 3 Fla. L. Weekly Supp. at 73 (quoting Pillsbury Flour Mills Co. v. Interlake S.S. Co., 40 F.2d 439 (2d Cir. 1930)).

398. Ch. 95-240, 1995 Fla. Sess. Law Serv. 1688 (West).

registration numbers. Such violations now constitute a first degree misdemeanor. Repeated violations constitute third degree felonies. Contractors must notify homeowners in conspicuous writing, at the time that the homeowner makes initial payment to the contractor, that there is a recovery fund for claims against contractors. The specific form to be used will be prescribed by the Department of Legal Affairs and provided by the Construction Industry Licensing Board by November 1, 1995.

One of the most important changes involves the homeowner's right to obtain a list of all subcontractors and materials suppliers which the contractor will use. This should prevent the general contractor from using unlicensed subcontractors. A contractor's failure to supply such a list within ten days after receipt of a proper request from the homeowner precludes the contractor from asserting liens to the extent that the owner is prejudiced. Furthermore, filing a fraudulent lien is now punishable as a third-degree felony, as does intentionally or knowingly making false statements regarding the payment of subcontractors and suppliers such that a person may rely on the statements and draw payments.

The *Bert J. Harris, Jr., Private Property Rights Protection Act*,[399] which becomes effective as of October 1, 1995, is the most important act relating to real property enacted so far in this legislative session. The act provides remedies for real property owners whose property "has been inordinately burdened by governmental action," which is defined in the act as "an action [that] . . . has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property . . . ."[400] The definition continues, emphasizing that the burden must be permanent and disproportionate in comparison to the burden on other properties. The act provides the procedures to be followed by property owners in filing claims, allows settlements, and requires court actions if a settlement agreement contravenes the application of state law. Of course, it provides for attorney's fees and costs. It also provides a mediation and dispute resolution mechanism for settling disputes regarding amendments to comprehensive plans. The property owner must, not less than 180 days prior to filing an action, present a written claim to the governmental entity. During this 180-day period, the governmental entity shall make a written offer of settlement, and must notify all contiguous

399. Ch. 95-181, 1995 Fla. Sess. Law Serv. 1311 (West).
400. *Id.* § 1(3)(e), 1995 Fla. Sess. Law Serv. at 1312.

landowners of the pending claim. If the settlement offer is rejected by the property owner, then suit can be filed in circuit court.

The *Florida Land Use and Environmental Dispute Resolution Act*,[401] which becomes effective October 1, 1995, provides:

> (3) Any owner who believes that a development order . . . or an enforcement action of a governmental entity[] is unreasonable or unfairly burdens the use of his real property, may apply within 30 days after receipt of the order or notice of governmental action for relief under this section.[402]

Relief consists of a hearing before a special master[403] or, for a landowner who has been denied an application for an amendment to a comprehensive plan, mediation or other alternative dispute resolution.[404]

The Florida Legislature also amended section 177.142 of the *Florida Statutes*[405] to authorize local governments to change the name of any subdivision, street, plat or other name appearing on an official plat or map, or even on any unofficial map or plat maintained by the clerk of the circuit court if it finds that the name constitutes an ethnic or racial slur.

Chapter 95-274 made comprehensive changes to chapter 721 of the *Florida Statutes* which deals with time-shares.[406] The law also made amendments to chapter 718 which deals with condominiums and expanded the statutory regulation of homeowners' associations under chapter 617 which deals with corporations that are not for profit.

Among the more important changes dealing with time-shares was the creation of new statute, section 721.065, which requires use of time-share resale purchase agreements containing prescribed disclosures about assessments for common expenses, penalties for non-payment, and a ten-day cancellation provision.[407] Also of note is a new section 721.071, dealing with trade secret protection for developers' confidential materials filed in conjunction with a public offering of a time-share plan.[408] Section 721.15

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401. *Id.* § 2, 1995 Fla. Sess. Law Serv. at 1315.

402. *Id.*

403. *Id.* § 2(5)-(29), 1995 Fla Sess. Law Serv. at 1316-1320.

404. Ch. 95-181, § 4, 1995 Fla. Sess. Law Serv. at 1315 (West) (amending FLA. STAT. § 163.3181).

405. Ch. 95-176, § 2, 1995 Fla. Sess. Law Serv. 1305, 1305 (West).

406. Ch. 95-274, 1995 Fla. Sess. Law Serv. 1936 (West).

407. *Id.* § 4, 1995 Fla. Sess. Law Serv. at 1944.

408. *Id.* § 6, 1995 Fla. Sess. Law Serv. at 1954 (to be codified at FLA. STAT. § 721.071).

was amended to prohibit managing entities from commingling of operating funds with reserve funds, or commingling of common expense funds of one time-share plan with common expense funds of other time-share plans, although such funds can be deposited into a common account for a period not to exceed thirty days.[409]

Chapter 95-274 included an amendment to section 721.20 prohibiting real estate brokers and salespersons from collecting advance fees for listing of time-shares.[410] It amends section 721.26 to increase the regulatory powers of the Division of Florida Land Sales, Condominiums, and Mobile Homes, and increases the disclosure requirements for multi-state time-shares.[411] Changes to chapter 718 of the *Florida Statutes* include amendment of section 718.111(15) to prohibit condominium associations from commingling of reserve and operating funds.[412] Section 718.117 was amended to enumerate the powers and duties of condominium directors after commencement of termination proceedings.[413]

With regard to homeowners' associations, sections 617.301 through 617.312 were substantially amended, rewording the definitions and the powers/duties sections, and specifying who may sue and be sued under homeowners' association law.[414] New statutory sections were created to provide for arbitration and mediation of disputes between associations and members and to provide for survival of association covenants after tax and foreclosure sales.[415] Additionally, section 689.26 was amended to include a mandatory disclosure statement which must be provided to prospective purchasers of real property subject to a homeowners' association membership requirement.[416] The disclosure must be supplied by developers of new homes as well as sellers in the resale market.[417]

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409. *Id.* § 13, 1995 Fla. Sess. Law Serv. at 1962 (to be codified at FLA. STAT. § 721.15(8)).

410. *Id.* § 14, 1995 Fla. Sess. Law Serv. at 1963.

411. Ch. 95-274, § 15, 1995 Fla. Sess. Law Serv. at 1963.

412. *Id.* § 35, 1995 Fla. Sess. Law Serv. at 1983.

413. *Id.* § 47, 1995 Fla. Sess. Law Serv. at 1993.

414. *Id.* §§ 52-62, 1995 Fla. Sess. Law Serv. at 1997-2005.

415. *Id.* §§ 61-62, 1995 Fla. Sess. Law Serv. at 2005.

416. Ch. 95-274, § 63, 1995 Fla. Sess. Law Serv. at 2005-06.

417. *Id.*

XIX. LIENS AND MECHANIC'S LIENS

Casa Linda Tile & Marble Installers, Inc. v. Highlands Place 1981, Ltd.[418] The tile installer sued to enforce a mechanic's lien after it ceased work due to nonpayment. The Highlands management counterclaimed for defective work and for punitive damages due to Casa Linda's filing of a lis pendens after the lien had been transferred to bond. Highlands alleged as a defense to payment the condition precedent that the defects in the work, as noted on a punchlist, be corrected.[419]

The court ruled that "[w]hen a contractor has substantially performed and otherwise complied with the mechanic's lien statute, it is entitled to an award on its mechanic's lien claim for the contract price less all damages caused by failure to render full performance."[420] Here, although the tile installer failed to obtain the required architect's certificate of completion, the court found substantial performance.[421] As for the punitive damages for filing a lis pendens after the lien was transferred to bond, the court ruled that, absent a finding of actual malice, punitives are not justified, either by statute or under a slander of title claim.[422]

Heidle v. S & S Drywall and Tile, Inc.[423] Ms. Heidle appealed from a denial of her recovery of attorney's fees from S & S Drywall, after a $10,840 lien foreclosure action filed by S & S was dismissed for lack of prosecution. The Fifth District Court of Appeal reversed, holding that Ms. Heidle was entitled to the attorney's fees under section 713.29, which allows the prevailing party to recover such fees.[424] There is no need to win on a counterclaim to be considered a prevailing party. Ms. Heidle prevailed because the action against her was dismissed.[425]

Hoepner & Assoc., Inc. v. Stewart Gilman Co.[426] The Fifth District Court of Appeal affirmed the Orange County Circuit Court's dismissal of Hoepner's action to foreclose a construction lien. Hoepner, a professional engineering company, recorded its original claim of lien on August 27, 1991, and then recorded an amended claim of lien on September 24, 1991. Hoepner filed suit to foreclose the lien on September 24, 1992, exactly one

418. 642 So. 2d 766 (Fla. 4th Dist. Ct. App. 1994).
419. *Id.* at 767.
420. *Id.* at 768.
421. *Id.*
422. *Casa Linda*, 642 So. 2d at 768.
423. 639 So. 2d 1105 (Fla. 5th Dist. Ct. App. 1994).
424. *Id.* at 1106.
425. *Id.*
426. 648 So. 2d 854 (Fla. 5th Dist. Ct. App. 1995).

year from the record date of its amended claim, but over one year from the original claim date.[427] The action was thus time barred under section 713.22(1) of the *Florida Statutes*, which provides that no lien shall continue for a longer period than one year after the claim of lien has been recorded unless within that time an action to enforce the lien is commenced in a court of competent jurisdiction. Recording an amended claim of lien does not toll the one-year time period.[428]

The court cited *Jack Stilson & Co. v. Caloosa Bayview Corp.*[429] in support of its holding that, "although the lien statutes authorize a correction or a change by way of an amendment to an original claim of lien, such amendment does not toll the statutory time to institute suit."[430] The rationale behind this interpretation is that the original and the amended claim represent only one claim, which begins when first recorded.

Paulk v. Peyton.[431] Appellant Paulk entered into a combination written and oral contract with Peyton to perform certain improvements on Peyton's real property. A dispute arose and Paulk instituted this action seeking damages for breach of contract and foreclosure of a mechanic's lien. Specifically, Paulk alleged that he furnished Peyton with a contractor's affidavit stating that all lienors had been paid and that all conditions precedent to the filing of the action had been satisfied. Peyton answered the averment by stating that she was "without knowledge."[432] Later, Peyton was granted summary judgment on the foreclosure claim because she was not furnished with an original contractor's affidavit, but instead was given a copy, which did not comply with the mechanic's lien statute, section 713.06(3)(d).[433]

The First District Court of Appeal reversed, holding that Peyton waived her defense of nonperformance of this condition precedent by not pleading it specifically and with particularity in her answer.[434]

Shipwatch Development Corp. v. Salmon.[435] In a construction dispute between Salmon, the contractor, and Shipwatch, the owner, the trial court imposed a lien against Shipwatch's property in the amount of $16,024.07.

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427. *Id.* at 854-55.

428. *Id.* at 855.

429. 278 So. 2d 282 (Fla. 1973).

430. *Hoepner*, 648 So. 2d at 855 (citing Jack Stilson & Co. v. Caloosa Bayview Corp., 278 So. 2d 282, 283-84 (Fla. 1973)).

431. 648 So. 2d 772 (Fla. 1st Dist. Ct. App. 1994).

432. *Id.* at 773.

433. *Id.*

434. *Id.* at 774.

435. 646 So. 2d 838 (Fla. 1st Dist. Ct. App. 1994).

The lien amount included amounts for Salmon's attorney's fees, as well as prejudgment interest. The First District Court of Appeal reversed the attorney's fees award because the trial court erred in not adjusting the lodestar fee based on the extent of success achieved by counsel for Salmon.[436] The original amount alleged by Salmon to be due was over $40,000.00, which indicates that the level of success was low.[437]

The court also modified the award of prejudgment interest because it erroneously included interest that accrued prior to the date the contractor's affidavit was served. The trial court had granted prejudgment interest from the date of filing the claim of lien, when the correct starting point is when the contractor's affidavit is served.[438]

Stunkel v. Gazebo Landscaping Design, Inc.[439] The Supreme Court of Florida answered the following certified question in the negative because a binding contract is necessary in order to file a mechanic's lien:

> DOES A SUBCONTRACTOR BEGIN TO FURNISH SERVICES, FOR THE PURPOSE OF TIMELY PROVIDING A NOTICE TO OWNER IN ACCORDANCE WITH SECTION 713.06(2)(a), FLORIDA STATUTES (1991), WHEN, WITHOUT ANY BINDING CONTRACTUAL OBLIGATION TO DO SO, HE OR SHE BEGINS TO SELECT MATERIALS AT SOME LOCATION OFF THE JOB SITE, FOR FUTURE INSTALLATION ON THE JOB SITE?[440]

The court also held that the forty-five-day period for giving notice to the owner of a possible lien claim under section 713.06 of the *Florida Statutes*, starts when a subcontractor begins to furnish services or materials *at* the job site.[441]

Gazebo Landscaping was the landscaping subcontractor of a general contractor who was building a home on the Stunkel's property. Gazebo had been orally contacted by the general contractor, and on November 7, 1990 took the Stunkels to select trees for the landscaping. The planting work at the Stunkel property did not begin until December 5, 1990. The Stunkels went bankrupt and Gazebo posted its notice of claim of lien on January 18, 1991. The issue was whether the forty-five-day period for posting a claim

436. *Id.* at 839.
437. *Id.*
438. *Id.*
439. 20 Fla. L. Weekly S220 (May 11, 1995).
440. *Id.* at S221.
441. *Id.*

of lien under section 713.06(2)(a) began to run on November 7 or December 5 of 1990. Fortunately for Gazebo, the court held that it began to run from the later date, so that Gazebo was within the deadline.[442]

Sturge v. LCS Development Corp.[443] The Sturges sought certiorari review of an order denying their motion to discharge a mechanic's lien. The lien arose from hurricane repairs done by LCS on the Sturges' property. LCS recorded a claim of lien after the Sturges refused to pay due to the quality of work and time delays. Subsequent to the filing of claim of lien, the Sturges sued for breach of contract and included a count to discharge the lien pursuant to section 713.21(4) of the *Florida Statutes*. The clerk issued a summons to show cause within twenty days why the lien should not be discharged. On the twentieth day, LCS filed a motion to extend the deadline to respond. After the twenty days had passed, the Sturges moved to discharge the lien and the motion was denied.[444]

The Third District Court of Appeal quashed the order and remanded with instructions to discharge the lien.[445] The court restated that mechanic's lien laws are to be strictly construed.[446] Extensions of time to respond pursuant to section 713.21(4) should only be granted for good cause, and such good cause must be shown within the twenty day period. The lien was discharged due to LCS's failure to comply with this requirement.[447]

Note that section 713.21(4) states that the circuit court of the county where the property is located is the court empowered to discharge liens. With the recent holding that county and circuit courts have concurrent jurisdiction with regard to equitable actions, such as foreclosure of liens, within the county court jurisdictional amount of $15,000, this statute should probably be amended to state that the county courts can also discharge liens. Although the lien in this case did not involve equity because it had not reached the foreclosure stage, other mechanic's lien cases which reach foreclosure could still involve claims for discharge. If these cases are being heard in county court, the county court should be able to decide the related discharge claims.

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442. *Id.*
443. 643 So. 2d 53 (Fla. 3d Dist. Ct. App. 1994).
444. *Id.* at 54.
445. *Id.* at 55.
446. *Id.* at 54.
447. *Id.* at 55.

XX. LIS PENDENS

Acapulco Construction, Inc. v. Redavo Estates, Inc.[448] The plaintiff, Acapulco Construction, filed a petition for a writ of certiorari seeking review of an order discharging their notice of lis pendens. The Third District Court of Appeal treated the petition as an appeal from a non-final order dissolving an injunction under rule 9.130(a)(3)(B) of the *Florida Rules of Appellate Procedure* and reversed the trial court's order discharging the lis pendens.[449] The plaintiffs sought to impose a constructive trust on the subject property, which was a viable claim entitling them to file a notice of lis pendens. In an action such as imposing a constructive trust which challenges the legal or equitable ownership of the property, a lis pendens is necessary to protect both the parties and subsequent purchasers or encumbrancers. It was not necessary for the plaintiffs to prove their claim in order to file a lis pendens; they only had to show a fair nexus between the apparent legal or equitable ownership of the subject property and the dispute involved in the lawsuit.[450]

Medical Facilities Development, Inc. v. Little Arch Creek Properties, Inc.[451] This case addresses the question of under what circumstances must a bond be posted by the proponent of a lis pendens when the lis pendens is not based upon a duly recorded instrument or construction lien. The Third District Court of Appeal affirmed the trial court's imposition of a bond.[452] The lis pendens was filed after Medical Facilities sued for specific performance of an agreement in which it was to purchase a building from Little Arch. Little Arch had entered into another contract to sell the property to someone else for $6.5 million. Medical Facilities filed a lis pendens preventing Little Arch from closing on the $6.5 million deal. Little Arch moved to require Medical Facilities to post a bond to protect Little Arch in the event that the lis pendens was later held to have been improperly filed. The trial court ordered Medical Facilities to post a $1 million bond.[453]

The court referred to section 48.23 of the *Florida Statutes*, which governs lis pendens. There are two types: those involving actions upon a duly recorded instrument of construction lien, which do not require a bond;

448. 645 So. 2d 182 (Fla. 3d Dist. Ct. App. 1994).
449. *Id.* at 183.
450. *Id.*
451. 656 So. 2d 1300 (Fla. 3d Dist. Ct. App. 1995).
452. *Id.* at 1303.
453. *Id.* at 1301-02.

and those which are not founded on a duly recorded instrument or construction lien, in which a bond might be required. This is controlled in the same manner as the method by which the court grants and dissolves injunctions. However, there are different approaches by the districts. Some courts grant the bond if the owner of the property can show that it will suffer irreparable harm if the lis pendens is unjustified. Others leave it to the court's discretion. The third approach makes the posting of a bond mandatory when the lis pendens is not founded upon a duly recorded instrument. The Third District Court of Appeal follows the mandatory bond approach.[454]

The appellants referred to *Chiusolo v. Kennedy*,[455] in which the Supreme Court of Florida stated, "[w]e agree . . . that the statutory reference to injunctions exists merely to permit property holders to ask in an appropriate case that the plaintiff post a bond where needed to protect the former from irreparable harm."[456] The Third District Court of Appeal stated that this was dicta and non-binding.[457] The lis pendens bond was analogized to a temporary injunction bond, which can be obtained as of right.[458] Judge Green dissented, arguing that lis pendens bonds should not be required unless the owner of the property would suffer irreparable harm. Further, the court stated that monetary harm alone, which is the harm that would have been caused by the lis pendens preventing the $6.5 million sale of the building, is not irreparable because there was an adequate remedy at law.[459]

XXI. MARKETABLE RECORD TITLE ACT

Martin v. Town of Palm Beach.[460] The 1948 deed to the County of Palm Beach provided that the land be used for no other purpose than as a public park, public beach, and recreational area. The County conveyed the land to the Town of Palm Beach in 1957 by a deed which did not mention the restriction, but did state that the conveyance was "subject to easements, covenants, limitations, reservations and restrictions of record."[461] In 1964, a shack on the property was converted into a fire station, which was

454. *Id.* at 1303.
455. 614 So. 2d 491 (Fla. 1993).
456. *Id.* at 492-93.
457. *Medical Facilities Dev., Inc.*, 656 So. 2d at 1303.
458. *Id.* at 1304.
459. *Id.* at 1307.
460. 643 So. 2d 112 (Fla. 4th Dist. Ct. App. 1994).
461. *Id.* at 113.

expanded in 1979. When the Town decided to replace the building with a new fire station, a County resident brought this action for an injunction.[462]

The district court decided[463] that the 1957 deed was the root of title for the purposes of the Marketable Record Title Act ("MRTA").[464] The court followed the statutory mandate to liberally construe the statute to effectuate the legislative purpose[465] of simplifying and facilitating land title transactions.[466] Accordingly, the general reference to "limitations, reservations and restrictions of record" was insufficient to preserve the restriction which appeared in a document on the record prior to the root because it did not refer to the book and page where the specific restriction could be found or refer to the name of the recorded plat which imposed the restriction.[467]

A most interesting point is hidden in a footnote.[468] The plaintiff had tried to convince the court to create an exception to MRTA for charitable donations. However, the district court wisely refused.[469] The reasons given were that: 1) to do so would constitute "impermissible judicial legislation"[470] and 2) it was a subject which should be "best addressed to the legislature."[471] However, the best reason for the refusal would have been the above-stated statutory rule of construction. Any exception to MRTA would have the effect of complicating and obstructing land transactions. Furthermore, the one asked for here would be particularly bad. Title searchers would be burdened with determining whether pre-root title transactions contained any limitation, reservation or restriction and, if so, whether the conveyance or devise had been a charitable donation. That information might not be discernible from the public records, so the inquiry might be difficult, slow and costly.

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462. The court declined to rule on the issue of the plaintiff's standing to bring this action because it was raised for the first time on oral argument. *Id.*

463. Associate Judge Diamantis wrote the opinion. Associate Judges Harris and Griffin concurred.

464. *Martin*, 643 So. 2d at 114 (citing FLA. STAT. §§ 712.01-.10 (1993)).

465. FLA. STAT. § 712.10 (1993).

466. *Id.* § 712.02.

467. *See* Sunshine Vistas Homeowners Ass'n v. Caruana, 623 So. 2d 490 (Fla. 1993).

468. *Martin*, 643 So. 2d at 115 n.7.

469. *Id.*

470. *Id.*

471. *Id.*

XXII. MOBILE HOMES

Doral Mobile Home Villas, Inc. v. Doral Home Owners, Inc.[472] The appellant, Doral Mobile Home Villas, Inc., owns and operates a mobile home park with more than 500 lots in Pinellas County. In 1991 and 1992, it served notices on its tenants that it intended to raise its rental rates. The mobile home owners opposed the increases and invoked the dispute resolution provisions of the Florida Mobile Home Act.[473] When a negotiated settlement could not be reached, the homeowners' association sued. Some homeowners withheld payment of the increased portion of their rent, and the homeowners' association sought permission to pay the disputed rent into the court's registry. The trial court allowed such payment and the park owner appealed. The parkowner argued that payment into the court registry was permissible only as a defense in actions brought by mobile home park owners against individual homeowners, and could not be used by the representative association. The Second District Court of Appeal agreed, relying upon the plain language of the statute. The court noted that the statute did not provide for payment of disputed rent in an action by a mobile homeowners' association, like it does in an action by the park owner for rent. The court opined, "[w]hether this was an oversight by the legislature or an affirmative decision to limit defenses in section 723.063 to tenants at risk of eviction is unclear. The statute, however, is not ambiguous in its failure to mention the association."[474] Therefore, Judge Altenbernd's opinion[475] held that payment of the disputed rent into the court registry was not available to the homeowners' association.

Florida Manufactured Housing Ass'n v. Department of Revenue.[476] The Association filed a petition with the Florida Division of Administrative Hearings challenging the proposed rules[477] dealing with the ad valorem taxation of mobile homes, arguing that the *Florida Constitution* prohibited the ad valorem taxation of mobile homes.[478] The petition was rejected and the First District Court of Appeal affirmed in a per curiam opinion.[479]

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472. 20 Fla. L. Weekly D75 (2d Dist. Ct. App. Dec. 28, 1994).

473. FLA. STAT. §§ 723.001-.0861 (1993).

474. 20 Fla. L. Weekly at D76.

475. Acting Chief Judge Campbell and Judge Quince concurred.

476. 642 So. 2d 626 (Fla. 1st Dist. Ct. App. 1994).

477. Proposed Rule 12D-6.001(3) and 12D-6.002(1)(d)1-2, FLORIDA ADMIN. CODE (published in 18 FLA. ADMIN. WEEKLY 389 (Jan. 24, 1992)).

478. *Florida Manufactured Hous. Ass'n*, 642 So. 2d at 627 (quoting FLA. CONST. art. VII, § 1(b)).

479. Associate Judge Jorgenson and Judges Barfield and Benton concurred.

The court noted that the constitution provides that the term "mobile home" will be "as defined by law,"[480] and in 1991 the legislature had redefined that term so as to exclude, for purposes of this section of the constitution, mobile homes permanently affixed to land owned by the mobile home owner.[481] The court could see no constitutional flaw in the legislative action, so the proposed rules were valid.[482] Judge Benton concurred, noting that since the litigation began, the relevant administrative rules were amended to deal with the association's prime concern, that inventory of dealers and manufacturers might be subject to the tax if permanently affixed to realty as often occurred with models or samples.[483]

XXIII. MORTGAGES

Anderson v. North Florida Production Credit Ass'n.[484] A foreclosure action was brought on a mortgage of a prior owner, which had been improperly indexed by the clerk of court. The current mortgagor and mortgagee were unaware of the improperly indexed mortgage and claimed that they had priority because of the recording error. The trial court disagreed and granted the foreclosure judgment to the prior mortgagee. The First District Court of Appeal affirmed.[485] The rule for mortgage priority is provided in section 695.11 of the *Florida Statutes*, which states that "[t]he sequence of . . . official numbers shall determine the priority of recordation," referring to the official number of recordation given by the clerk of courts when an instrument is recorded.[486] Although indexing is a statutory duty imposed on the clerk of courts, the priority of mortgages is not based on proper indexing. Rather, it is based on ranking of official register number.[487]

480. FLA. CONST. art. VII, § 1(b).

481. FLA. STAT. § 193.075 (1991).

482. *Florida Manufactured Hous. Ass'n*, 642 So. 2d at 627.

483. FLA. STAT. § 193.075 (as modified by 1993 Fla. Laws ch. 93-132 and 1994 Fla. Laws ch. 94-353).

484. 642 So. 2d 88 (Fla 1st Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995).

485. *Id.* at 91.

486. FLA. STAT. § 695.11 (1993).

487. *Id.*

BancFlorida v. Hayward.[488] The bank appealed an order granting priority to purchasers of single family homes over the lender because the lender had actual notice of the buyers' purchase and sale agreements with the developer prior to the bank's loan to developer. The Fourth District Court of Appeal affirmed.[489]

The developer owned the land which was to be developed. Each buyer entered into a purchase and sale contract with the developer who was to build a home on the lot. The developer would, with each transaction, go to the lender and obtain a separate construction loan for each lot. Each loan and mortgage was executed and recorded *after* the purchase and sale contracts were executed. The equitable liens held by the purchasers, of which the bank had actual notice, were superior to the mortgages of the bank.[490]

Bank One, Dayton v. Sunshine Meadows Condominium Ass'n.[491] Sunshine Meadows is a condominium equestrian center which was developed in phases. The developer completed and sold the units in phase I and then executed a note and mortgage on 1.43 acres to begin developing phase II. The developer subsequently amended the original declaration of condominium to make phase II part of the common elements of the condominium. The bank consented to the amendment. When the developer defaulted, the bank sought to foreclose the entire condominium, arguing that its mortgage encumbered property which was part of the common elements, and that those common elements were an appurtenance to each unit of the condominium.[492] The trial court agreed with the lender, but the district court of appeal reversed, holding that the lender's consent to the amended declaration of condominium subjected the mortgage to the provisions of condominium law.[493] Section 718.121(1) prohibits liens against the condominium property as a whole unless there is unanimous consent of all unit owners. Additionally, section 718.107 prevents the separation of an individual condominium unit interest from the undivided interest in the appurtenant common elements. The mortgage covered the property which

488. 20 Fla. L. Weekly D761 (3d Dist. Ct. App. Mar. 29, 1995). The court subsequently withdrew this opinion on rehearing and replaced it with a new one after the end of this article's survey period. *See* BancFlorida v. Hayward, 20 Fla. L. Weekly D2041 (3d Dist. Ct. App. Sept. 6, 1995).

489. *Hayward*, 20 Fla. L. Weekly at D761.

490. *Id.*

491. 641 So. 2d 1333 (Fla. 1994).

492. *Id.* at 1334.

493. *Id.*

was to become the common elements and not the units. Therefore, the lender could not foreclose on the units because it had no mortgage on them. In addition, the lender could not foreclose on the specific mortgaged property because it was now part of the condominium common elements, which cannot be divided from the unit interests. The supreme court, in weighing the equities, agreed that the bank caused its own harm by consenting to the amended declaration and that it would be inequitable to subject the unsuspecting unit owners to the lender's mortgage.[494]

Bay Financial Savings Bank v. Hook.[495] The bank obtained a final default judgment against Hook and other guarantors of a mortgage which the bank had foreclosed. Hook moved the lower court to set aside, amend, or reduce the default judgment, arguing that the bank's receipt of monies from collateral sources reduced its deficiency claim. The court denied the motion and Hook filed a complaint in another county asking the court to void the default or reduce the amount awarded and to strike the final judgment from the public records in the county where the foreclosure had been decided. Hook was precluded by res judicata. The bank then sought an award of attorney's fees in accordance with sections 57.105 and 57.115 of the *Florida Statutes*. The trial court denied the bank's motion, and the bank appealed.[496]

The Second District Court of Appeal held that Hook was barred by res judicata from bringing the same litigation in a different county.[497] Although Hook voluntarily dismissed his complaint after the bank asserted res judicata, the Second District Court of Appeal held that "the filing of a lawsuit that is nonjusticiable on its face offers an appropriate setting for the fulfillment of section 57.105's purpose to deter misuse of the judicial system."[498] Therefore, the court reversed and remanded with directions to enter an order awarding the bank a reasonable fee.[499]

Circle Mortgage Corp. v. Kline.[500] The Klines applied to Circle Mortgage to secure an adjustable rate purchase money mortgage to buy a condominium unit. The interest rate was to change every twelve months, with the first rate change to occur eleven months after the due date of the first mortgage payment. The closing occurred in December of 1991. At the

494. *Id.* at 1336.
495. 648 So. 2d 305 (Fla. 2d Dist. Ct. App. 1995).
496. *Id.* at 306.
497. *Id.* at 307.
498. *Id.*
499. *Id.*
500. 645 So. 2d 75 (Fla. 4th Dist. Ct. App. 1994).

closing, one document contained a scrivener's error, providing that the first interest rate change would occur in December of 1993, instead of January of 1993, as contemplated in the previous disclosures. The Klines signed a compliance agreement in which they promised to cooperate in the correction of any clerical or other errors later discovered regarding the closing documents. Circle Mortgage subsequently sold the loan to Beneficial Mortgage Corporation, which discovered the error. Beneficial refused to accept the loan and Circle Mortgage sought to correct the error, but the Klines refused to cooperate. Circle Mortgage then filed a three-count complaint to foreclose the mortgage, reform the note, and recover damages and attorney's fees arising from breach of the compliance agreement.[501]

The trial court held in favor of Circle Mortgage on the reformation count, but denied the foreclosure and breach of contract claims. Circle Mortgage appealed the denial of damages, and the Klines cross-appealed the decision granting reformation.[502]

The Fourth District Court of Appeal affirmed the decision granting reformation because there was a definite prior agreement between the parties.[503] "The rationale for reformation is that a court sitting in equity does not alter the parties' agreement, but allows the defective instrument to be corrected to reflect the true terms of the agreement the parties actually reached."[504] The trial court's decision passed the clearly erroneous standard of review.

The Fourth District Court of Appeal also affirmed the denial of damages because Circle Mortgage could not prove actual losses when it was still collecting the monthly payments.[505] The argument of lost sale value of the loan was unsupported by documentation. Furthermore, after the reformation, the loan would place the parties in the position they would have occupied if the error had not been made, except for the litigation expenses.[506] On the claim for attorney's fees, the District Court of Appeal noted that the trial court had retained jurisdiction to make the award, and therefore, the issue was not yet appealable.[507]

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501. *Id.* at 77.
502. *Id.*
503. *Id.*
504. *Id.* at 78 (citing Providence Square Ass'n v. Biancardi, 507 So. 2d 1366, 1370 (Fla. 1987)).
505. *Circle Mortgage Corp.*, 645 So. 2d at 79.
506. *Id.*
507. *Id.*

FDIC v. Verex Assurance, Inc.[508] The Supreme Court of Florida answered the following certified question in the affirmative for the United States Court of Appeal for the Eleventh Circuit: "Did Fla.Stat. § 627.409 apply to applications for and contracts of mortgage guaranty insurance prior to the enactment of Fla.Stat. § 635.091 on October 1, 1983?"[509]

The FDIC brought suit against Verex, the insurer, to collect on two policies covering two loans made by Sunrise Savings and Loan. FDIC was the successor in interest of the liquidated S & L. Verex claimed that it was entitled to rescind the two policies because of material misrepresentations contained in the applications. The misrepresentations involved overstating the amounts given as down payment. Section 627.409 provides that when a borrower misrepresents a material fact in a loan application, which misrepresentation forms part of the insurance application, the risk of loss from the loan is placed on the bank and not the mortgage insurer. The district court agreed and entered summary judgment for Verex. The FDIC appealed, arguing that the above statute did not apply to mortgage insurance policies issued before October 1, 1983, such as the two policies in question.[510]

The court noted that although chapter 635 of the *Florida Statutes*, the mortgage guaranty insurance chapter, does not contain a provision similar to section 627.409, that section has been applied to mortgage insurance policies in the past.[511] On October 1, 1983, however, chapter 635 was specifically amended through section 635.091, titled "Provisions of Florida insurance Code applicable to mortgage guaranty insurance." This new section did not mention section 627.409, so that it would not apply to mortgage insurance policies after October 1, 1983. The question certified asked whether section 635.091 was also meant to make section 627.409 inapplicable to mortgage insurance policies issued prior to October 1, 1983.[512] The Supreme Court of Florida held that section 627.409 *did* apply to pre-October 1, 1983 policies.[513]

The court concluded that the legislature did not intend that mortgage guaranty insurance should be governed only by the provisions of chapter 635, but also by the general insurance provisions of chapter 627.409.[514]

508. 645 So. 2d 427 (Fla. 1994).
509. *Id.* at 428.
510. *Id.* at 429.
511. *Id.*
512. *Id.* at 430.
513. *Verex*, 645 So. 2d at 432.
514. *Id.*

Mortgage insurance is a form of casualty or surety insurance, as defined in section 635.011, and these are two types of insurance governed by section 627. Therefore, until section 635.091 became effective, mortgage insurers were protected from material misrepresentations.[515]

First National Bank of Southwest Florida v. Cardinal Roofing & Siding of Florida, Inc.[516] The bank sought to rescind a satisfaction of mortgage it had filed by mistake. The mortgage secured a loan to the construction company under which Cardinal Roofing was a subcontractor. When Cardinal was not paid, it filed a claim of lien and foreclosed. Cardinal purchased the subject property at a clerk's sale free and clear of the bank's mortgage. When the bank sought rescission of its satisfaction of mortgage and reinstatement of its mortgage, the trial court dismissed for failing to state a valid cause of action.[517]

The Second District Court of Appeal reversed, holding that rescission of a mortgage satisfaction and reinstatement of the mortgage is a valid cause of action in Florida.[518]

James v. Nationsbank Trust Co.[519] The appellants purchased homes from General Development Corporation ("GDC"), and financed the purchases with GDC's mortgage subsidiary. Nationsbank subsequently purchased the loans from the originating mortgagee. Shortly thereafter, GDC was indicted for criminal fraud; the appellants stopped paying their mortgages, and Nationsbank foreclosed. The trial court granted a summary judgment to Nationsbank. The appellants alleged that Nationsbank was not a holder in due course, and thus was not free of the personal defense of fraud in the inducement, the borrowers claiming they were fraudulently induced to execute the notes and mortgages.[520]

The appellants argued that Nationsbank, in purchasing the loans, became part of GDC's conspiracy to defraud, because the proceeds from the loan purchases allowed GDC to continue its sales scheme. The Fifth District Court of Appeal rejected this argument.[521] However, the court reversed and remanded on the claim by the borrowers that Nationsbank was aware of GDC's fraud scheme when it purchased the loans.[522] Such

515. *Id.* at 430
516. 639 So. 2d 1101 (Fla 2d Dist. Ct. App. 1994).
517. *Id.* at 1101-02.
518. *Id.* at 1102.
519. 639 So. 2d 1031 (Fla. 5th Dist. Ct. App. 1994).
520. *Id.* at 1032.
521. *Id.* at 1033.
522. *Id.* at 1034.

knowledge would preclude holder in due course status for Nationsbank. The borrowers had alleged that they were induced to buy their homes for more than they were actually worth, due to fraudulent appraisals which misrepresented their value. Nationsbank was allegedly aware of the invalidity of the appraisals. The issue of knowledge should have precluded entry of summary judgment for Nationsbank.

Koschler v. Dean.[523] The Koschlers appealed a final judgment quieting title in favor of Dean, the personal representative of the estate of William H. Dean, and determining that the Koschlers' mortgage was invalid. On March 1, 1966, a warranty deed dated February 28, 1966 was recorded in the public records of Pinellas County, conveying the property at issue to "William H. Dean and Mary Dean, his wife."[524] William and Mary were divorced at that time. However, they did remarry later on June 21, 1966. The two remained legally married until William's death on May 28, 1990, but they did not live together. Only William lived at the property at issue. Mary lived with another man and "held herself out to be his wife . . . ."[525] After William died, Mary and the man she was living with, but not married to, gave a mortgage to the Koschlers on William's residence. The person who conducted the title search concluded from the record that title to the property vested in Mary as the surviving spouse of William. Mary and her boyfriend executed an affidavit stating that no one else had a legal or equitable interest in the property.[526]

Meanwhile, unknown to the Koschlers, Robert Dean, as personal representative, began an adversary proceeding in the probate division of the circuit court against Mary, challenging her interest in the property and seeking a declaration that she was not entitled to participate in William's estate as an heir. On the day before the closing date of the above mentioned mortgage transaction, Robert Dean filed a notice of lis pendens against the property in the probate division of the circuit court. However, he did not record the lis pendens in the official county records until 1991 after obtaining a judgment divesting Mary of any interest in William's estate. Hence, he filed the quiet title action against the Koschler mortgage.[527]

The trial court held that the Koschlers were not "bona fide mortgagees for value" because, if they had searched the name of Mary's boyfriend, they

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523. 642 So. 2d 1119 (Fla. 2d Dist. Ct. App. 1994); *see also supra* text accompanying notes 235-37.

524. *Id.* at 1120.

525. *Id.*

526. *Id.*

527. *Id.*

would have found a false affidavit alleging that Mary was married to her boyfriend.[528] The Second District Court of Appeal reversed, holding that this was neither in the chain of the property's title nor of any bearing on its title.[529] The court stated that the Koschlers were entitled to rely on the chain of title found in the official records, absent actual knowledge of an adverse unrecorded right.[530] The court stated that fault lies with Robert Dean for not recording the notice of lis pendens in the public records at the time he filed it in the probate division of the court.[531] "Documents filed in the probate division of the court do not constitute constructive notice to purchasers for value of real property."[532]

Metroplex Investments, Inc. v. Precision Equity Investments, Inc.[533] This appeal by Metroplex, the purchaser at a judicial sale, was based on *Florida Statute*, section 45.031(1) as it existed at the time of litigation, prior to the statutory changes in 1993. Section 45.031(1) provided that the owners of property in foreclosure, or their successor in interest, could redeem the property up to the time of the judicial sale. This was consistently interpreted to mean that redemption could occur at any time prior to the issuance of a certificate of title, which could be subsequent to the date of sale. The current version of section 45.031(1), section 45.0315, provides a more limited redemption period: redemption must now occur, if at all, prior to the issuance of the certificate of sale.[534]

The trial court held that Precision, the mortgagor, had complied with the redemption statute, and the Fifth District Court of Appeal affirmed.[535] The judicial sale was held on July 20, 1993 and the property was redeemed on July 28, 1993. The certificate of title was not issued until August 2, 1993. These facts demonstrated clear compliance with the redemption statute. Metroplex argued that the purchaser at sale should not have to search for information concerning redemption, and that the clerk of court should have been put on notice of any attempted redemption. The Fifth District Court of Appeal disagreed, holding that the statute existing at the time of redemption placed no duty on the clerk of court to provide

528. *Koschler*, 642 So. 2d at 1120-21.
529. *Id.* at 1121.
530. *Id.*
531. *Id.*
532. 653 So. 2d at 1121 (citing Pierson v. Bill, 189 So. 679 (Fla. 1939)).
533. 647 So. 2d 304 (Fla. 5th Dist. Ct. App. 1994).
534. *Id.* at 305.
535. *Id.*

information concerning redemption.[536] Furthermore, Metroplex had actual knowledge that the property would be redeemed because the appellees had notified Metroplex.[537]

Chief Judge Harris dissented because the redemption was not completed until after the certificate of title was issued to Metroplex. Specifically, the mortgagor paid the total amount due to the mortgagee, but the record did not reflect when or if a satisfaction of mortgage had been recorded. Additionally, the deed to the redeemer was not recorded until four days after the certificate of title had been issued to Metroplex. To further complicate the situation, Metroplex had already conveyed the property to Mark Orman when the deed to Precision was recorded. However, Metroplex repurchased the property from Mr. Orman in order to bring this action.[538]

While this case seems to implicate the recording act, it is never cited in the decision. One interesting question is whether, based on the recording act, Metroplex would still lose because it had actual notice that the redemption would occur. Metroplex was a purchaser at a judicial sale and was charged with notice that a right of redemption existed. As Chief Judge Harris argued, these problems could be avoided by requiring redemption to occur by depositing the total amount due with the clerk, rather than extrajudicially with the mortgagee.

Rissman v. Kilbourne.[539] In 1980, Rissman contracted to purchase real property in Alachua County. The property was encumbered by three mortgages. Rissman gave an "all inclusive" note and mortgage to the seller.[540] After executing the purchase agreement, Rissman obtained estoppel letters stating the balances due from each of the three mortgagees. Two years later, Rissman sued the seller for breach of the purchase warranties concerning the sewer system. As part of the judgment, he again obtained estoppel letters from the three mortgagees.[541]

In 1990, pursuant to a request for a payoff statement from one of the mortgagees, the mortgagee responded by stating that there had been an error in its prior estoppel letters and that an additional $67,000 was owed.[542]

536. *Id.*

537. *Id.*

538. *Metroplex*, 647 So. 2d at 306 n.1.

539. 643 So. 2d 1136 (Fla. 1st Dist. Ct. App. 1994).

540. An "all-inclusive" note is like a wrap-around, except that here the seller/mortgagee received only its excess portion of the loan payments; the buyer/mortgagor paid the three preexisting mortgages directly, as if assuming them.

541. *Rissman*, 643 So. 2d at 1138.

542. *Id.*

Rissman responded with three letters from his attorneys stating that the mortgagee was estopped from asserting a different amount due and offering to pay the balance under the estoppel letters. After receiving no response, Rissman filed suit for a declaratory judgment on the balance. The trial judge ruled in favor of the mortgagee without explanation. Rissman appealed, claiming error in not finding estoppel and in holding that his letters were not valid tenders of the amount due.[543] The First District Court of Appeal affirmed the ruling that the three attorneys' letters were not tenders because no actual tender of funds had been made.[544] However, the court reversed on the claim of estoppel, holding that Rissman relied on the mortgagee's statements in the prior estoppel letters to his detriment.[545] The detrimental reliance consisted of Rissman's closing on the original purchase, thereby relying on the amount stated as the balance of the mortgage.[546]

RSR Investments, Inc. v. Barnett Bank.[547] Barnett obtained a foreclosure judgment in the amount of $86,109.59.[548] Due to a clerical error by Barnett's attorney, no one appeared on Barnett's behalf to bid at the foreclosure sale. Further, a provision in the judgment required Barnett to advance the costs of the sale, which it had not done.[549] The clerk of court allowed RSR, along with another investor, to pay the sale costs. The sale was held and RSR purchased the property with an unopposed bid of $5000. Barnett's counsel then filed a motion to set aside the sale, arguing excusable neglect in the clerical error and the gross inadequacy of the sale price.[550] The trial court found the $5000 sale price "sublimely inadequate" and that it raised a "presumption of bad faith on the part of the buyer."[551] The property was apparently worth over $100,000. The Second District Court of Appeal affirmed, holding that the unopposed bid price coming from an investor experienced in real estate supported the trial court's finding that the purchasers were not bona fide purchasers, and it was not inequitable to set aside the sale.[552]

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543. *Id.* at 1137.
544. *Id.* at 1140.
545. *Id.* at 1139.
546. *Rissman*, 643 So. 2d at 1139-40.
547. 647 So. 2d 874 (Fla. 2d Dist. Ct. App. 1994).
548. *Id.* at 874.
549. *Id.*
550. *Id.* at 875.
551. *Id.*
552. *RSR Investments, Inc.*, 647 So. 2d at 875.

Judge Quince dissented, arguing that Barnett had caused its own harm and that the trial court erred in the manner by which it took judicial notice of the value of the property. Specifically, the trial court did not afford the opposing side an opportunity to offer its own evidence on the matter.[553] As such, the trial court was not in a position to conclude that the sale price was inadequate. Consequently, Judge Quince did not believe that the facts justified setting aside the sale.[554]

United National Bank v. Tellam.[555] This decision is very relevant to commercial banks and has the effect of invalidating many existing dragnet clauses. The issue on appeal was whether a mortgagee can enforce a dragnet clause in a promissory note against a preexisting obligation, the basic purpose of dragnet clauses.[556] The court held that dragnet clauses are to be strictly construed against the drafter and that debts incurred prior to the security agreement are not covered within a dragnet clause, unless those debts are specifically identified in the security agreement itself.[557] The requirement for specification seems reasonable because the lender will know all prior debts. In addition, the requirement imparts record notice to other lienors of the extent of coverage of the mortgage.[558]

The majority failed to note that in this case, the dragnet clause was located in the note, not the mortgage. Furthermore, the note which contained the dragnet clause was paid in full. The bank sought to use a dragnet clause contained in a paid off note to make a mortgage, which secured the paid off note, cover a separate note, now in default. The court probably could have decided the case on these facts alone, and not set forth a new restriction on dragnet clauses.

XXIV. OPTIONS

Summit Boulevard Animal Clinic v. Lemon Tree Plaza.[559] The tenant clinic sued the lessee for breach of the option and right of first refusal in a commercial lease.[560] The alleged breach was the lessor's failure to give the clinic the chance to exercise its right to purchase the plaza at a fixed price as provided in the commercial lease. The clinic lost at the trial court

553. *Id.* at 876 (Quince, J., dissenting).
554. *Id.*
555. 644 So. 2d 97 (Fla. 3d Dist. Ct. App. 1994).
556. *Id.* at 97-98.
557. *Id.* at 98.
558. *Id.* at 99.
559. 641 So. 2d 437 (Fla. 4th Dist. Ct. App. 1994).
560. *Id.* at 438.

on a directed verdict because it failed to submit sufficient proof that it was capable of completing the purchase at the specified price.[561] The Fourth District Court of Appeal affirmed in an opinion written by Judge Stevenson.[562]

The court recognized that there were no Florida cases directly on point and followed "the overwhelming weight of authority,"[563] as illustrated by the Massachusetts case of *Kanavos v. Hancock Bank & Trust Co.*[564] The optionee would only be harmed by the optionor's breach if he was deprived of a right that he was planning to, and able to exercise. The optionee is the one in possession of the evidence concerning his ability to perform, so the burden of producing that evidence should fall on him.[565] Where the optionee's evidence could not establish it had the ability to perform, the trial court properly granted a directed verdict.[566]

XXV. PREMISES LIABILITY

National Property Investors, II, Ltd. v. Attardo.[567] The victim of an abduction and sexual assault sued the owners of the apartment complex where she lived. She claimed the owners were liable due to inadequate lighting and security in the parking lot where the crimes occurred. The owners filed a third-party action against the Southland Corporation, owners of a nearby 7-Eleven store, alleging that Ms. Attardo had been threatened and assaulted in the 7-Eleven parking lot. The trial court dismissed the third-party complaint and Fifth District Court of Appeal affirmed in a brief opinion written by Chief Judge Harris.[568] The court reasoned that the third-party complaint was susceptible to two different interpretations.[569] One was that there had been two separate assaults, one on the 7-Eleven lot and one on the apartment lot.[570] However, Ms. Attardo had not sued the owner of the 7-Eleven for an assault on its lot; therefore, the apartment owners did not have standing to do so.

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561. *Id.*
562. Judge Gunther and Associate Judge Barr concurred. *Id.* at 439.
563. *Id.* at 438.
564. 479 N.E.2d 168 (Mass. 1985).
565. *Summit Boulevard*, 641 So. 2d at 438-39 (citing *Kanavos*, 479 N.E.2d at 172).
566. *Id.* at 439.
567. 639 So. 2d 691 (Fla. 5th Dist. Ct. App. 1994).
568. Judges Peterson and Diamantis concurred.
569. *Id.* at 692.
570. *Id.*

Apparently, the second theory was that only one assault had occurred.[571] It began when the perpetrator was attracted to Ms. Attardo on the 7-Eleven lot and came to fruition on the apartment lot. However, the court found that the allegations did not suggest that any abduction or assault took place on the 7-Eleven property. This led the court to conclude that "[a]pparently the security at 7-Eleven . . . was sufficient to protect its patron so long as she remained there."[572] Consequently, there was no basis on which the owner of the 7-Eleven could be held liable. The district court suggested that owners of the 7-Eleven might be liable if the abduction actually began on their lot. The court allowed them the chance to amend the third-party complaint accordingly if they could do so "IN GOOD FAITH."[573]

Paul v. Sea Watch of Panama City Beach, Inc.[574] A bar patron sued for damages after she fell from a tall bar stool while tipping one of the male nude dancers performing in the bar's review. She alleged that the bar was negligent in allowing an unsafe and dangerous condition to exist at the club. Specifically, there was a drastic drop-off of the floor area near the stage where the live entertainers were performing which constituted unsafe seating conditions. The trial court granted summary judgment in favor of the defendant bar, but the First District Court of Appeal reversed.[575]

The court stated: "[i]n Florida, a landowner owes two duties to an invitee: (1) to warn the invitee of concealed dangers which are or should be known to the owner but which the invitee cannot discover through the exercise of due care, and (2) to keep its property in reasonably safe condition."[576] The district court agreed that the bar had no duty to warn patrons of the difference in elevation of the floors because that was patent. However, a genuine issue existed as to whether the bar was reasonably safe because the bar may have allowed a dangerous condition to exist through its policy of "condoning its patrons' consumption of unlimited alcohol and permitting contact between the entertainers and the patrons who were seated on high stools immediately next to an elevated dance floor."[577] Furthermore, liability based upon this theory, rather than on a theory that the dancer acted negligently in his manner of accepting the tip, would have made the

571. *Id.*
572. *Attardo*, 639 So. 2d at 692.
573. *Id.*
574. 643 So. 2d 665 (Fla. 1st Dist. Ct. App. 1994).
575. *Id.* at 666.
576. *Id.* at 667 (citations omitted).
577. *Id.*

bar's claim that the dancers were independent contractors rather than employees irrelevant.[578]

XXVI. SALES

Bodon Industries, Inc. V. Brown.[579] Bodon was an out-of-state corporation seeking to acquire a concrete plant in Florida. A Texas operator of a concrete plant learned of Bodon's interest and offered to assist Bodon without receiving a commission. He hoped to be hired to work at whatever facility Bodon acquired. He enlisted the help of his sister-in-law, a Florida real estate broker.

The sister-in-law contacted the seller who executed an agreement to pay a $50,000 commission, to be split equally between the sister-in-law's firm and the seller's broker. Unfortunately, the negotiations fell through. However, without the knowledge of the broker, the negotiations resumed eight months later between the principals. Upon learning of the sale, the brokers brought suit against the seller for the $50,000 commission or, in the alternative, a commission based on quantum meruit.[580] The jury verdict was based upon the latter in the amount of $100,000, to be shared equally by the seller's broker and buyer's sister-in-law.[581]

The seller brought this action against the buyer for indemnification based upon a provision in the contract of sale that, "buyer agrees to save harmless the seller from any claim by any party asserted for a real estate commission, finder's fee or other compensation resulting from any action taken by buyer."[582] The seller prevailed in the trial court, but lost on appeal. Judge Peterson, writing for the Fifth District Court of Appeal, applied traditional rules of broker-client relationships.[583] The court found that the brokers were working for the seller, not the buyer.[584] There was no contract between the buyer and his sister-in-law.[585] Rather, she was entitled to a share of the commission as the selling broker due to an independent agreement she had with the listing broker.[586] In the absence

578. *Id.* at 667-68.
579. 645 So. 2d 33 (Fla. 5th Dist. Ct. App. 1994).
580. *Id.* at 35.
581. *Id.*
582. *Id.*
583. Judges Sharp and Goshorn concurred. *Id.* at 36.
584. *Bodon Indus., Inc.*, 645 So. 2d at 35.
585. *Id.*
586. *Id.* at 35-36.

of a selling broker, the seller would have had to pay the full commission to the listing broker.[587]

The court held that an indemnity clause "must be construed strictly in favor of the indemnitor when such provision is not given by one in the insurance business but is given as an incident to a contract, the main purpose of which is not indemnification."[588] This indemnity provision was intended to protect the seller from being surprised by a claim for a broker's commission, a particularly unpleasant surprise if it came after the seller had already paid out the full commission. But since this claim should not have been a surprise to this seller, the seller was not entitled to indemnification.

Munshower v. Martin.[589] The seller agreed to sell a $257,000 house to the buyer who, under an oral lease, was allowed to move in before the closing. A short time after the parties signed the purchase and sale agreement, Hurricane Andrew struck and damaged the roof of the house. The seller's insurance company issued a $17,000 check for repairs. A dispute ensued over who had a legal right to the funds. The buyer considered the seller's claim to the funds to be a breach of the purchase and sale agreement and refused to close. The seller then declared the buyer in default. The buyer sued for specific performance, a declaratory judgment that he was entitled to the insurance funds, quantum meruit for the cost of materials and services paid by the buyer to repair the house prior to closing, and breach of the oral lease.[590]

The trial court relied on a provision in the purchase/sale contract, stating that if after a roof inspection, repairs were necessary and the amount was in excess of two percent of the purchase price, the seller had the option of paying the excess or cancelling the contract if the buyer refused to pay for the excess.[591] Because of this option, the seller was not compelled to specifically perform. The Third District Court of Appeal reversed.[592] Judge Nesbitt's opinion focused upon a different contract provision and it expressly placed the risk of loss prior to closing on the seller.[593] The court held that this risk of loss provision, and not the roof inspection provision, was the controlling clause in the case of casualty loss. The doctrine of equitable conversion, which would have shifted the risk of loss

587. *Id.* at 35.
588. *Id.* at 36.
589. 641 So. 2d 909 (Fla. 3d Dist. Ct. App. 1994).
590. *Id.* at 910.
591. *Id.*
592. *Id.* at 910-11.
593. *Id.* at 910.

to the buyer, was not applied because the parties had expressly agreed to a different risk allocation.[594] Therefore, the seller would be responsible for the repairs, would have to indemnify the buyer for the buyer's out of pocket repair costs, and would have to specifically perform.[595] Consequently, the seller was entitled to the insurance funds.[596]

Ivanov v. Sobel.[597] The Ivanovs sought the assistance of a broker to purchase a home. After negotiations, they entered a contract to purchase a home for $300,000, placing a $30,000 deposit in the broker's trust account. To facilitate the closing, the salesperson suggested that the Ivanovs form a Florida corporation, place the money to close in the corporate account, and authorize the salesperson to issue checks from that account. The salesperson then absconded with the money causing the Ivanovs to default on the purchase contract. After the default, the realtor disbursed the deposit to the sellers. The Ivanovs sued the sellers, the broker, and the salesperson.

The trial court granted summary judgment in favor of the sellers and the Third District Court of Appeal affirmed.[598] The court concluded that the sellers were innocent and could not be held responsible for the intentional wrongful act of the real estate salesperson.[599] The salesperson's wrongful act could not have been anticipated and it certainly did not further the seller's interests since it caused them the loss of the sale.[600] The buyers had in fact defaulted and the sellers were, therefore, entitled to rely upon the liquidated damages clause.[601]

It is unfortunate, however, that the court did not elaborate on the agency relationship which the seller had with the broker and its salesperson. Traditionally, the selling broker would be considered to be the sub-agent of the seller unless a different arrangement had been agreed upon. It was not suggested that the Ivanovs had contracted for the broker to be its agent, for example, to act as the buyer's broker. Nor was there any suggestion that a dual agency relationship existed. Consequently, it appeared that the money was probably misappropriated from the sellers' agent. The court referred to the rule, "where one of two innocent persons must suffer from the wrongful

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594. *Munshower*, 641 So. 2d at 911.

595. *Id.*

596. *Id.* at 910-11.

597. 654 So. 2d 991 (Fla. 3d Dist. Ct. App. 1995).

598. Chief Judge Schwartz and Judges Nesbitt and Cope concurred in the per curiam opinion.

599. *Id.* at 992.

600. *Id.*

601. *Id.*

act of a third, the person who made the wrongful act possible must bear the loss."[602] Would the application of that rule put the burden on the agent's principal who, in this case, just might be the seller? It is a thought which bears investigating.

Wasser v. Sasoni.[603] The contract to buy a sixty-seven-year-old apartment building expressly provided that the sale was "as is" and contained standard inspection and integration clauses. After the closing, the buyer had the building inspected and discovered that it had structural problems. He sued for fraud and the trial court granted summary judgment to the seller.[604] The Third District Court of Appeal affirmed.[605]

The court held, in an opinion written by Judge Gersten, that *caveat emptor* is still the law in commercial real estate transactions.[606] Here, the sophisticated buyer had agreed to a contract with an "as is" provision and an integration clause. There were no allegations that this agreement was procured by fraud. Moreover, it has long been established that "a misrepresentation is not actionable where its truth might have been discovered by the exercise of ordinary diligence."[607] He had the opportunity to inspect prior to closing, but chose not to exercise that right. The seller's statement that it was "a very good building" and that it required only a "normal type of maintenance"[608] constituted only the seller's opinion or, at most, puffing under the circumstances.

XXVII. SOVEREIGN IMMUNITY

Hummel v. Stenstrom-Strump Construction & Development Corp.[609]

The Hummels, owners of land in Sanford, Florida, contracted with the defendant builder to construct a home on the Hummels' lot. The builder submitted the plans to the City of Sanford for approval and then built the home. The City issued a certificate of occupancy once the home was completed and the Hummels moved in. Shortly thereafter, stormwater

602. *Ivanov*, 654 So. 2d at 992 (citing Trumbull Chevrolet Sales Co. v. Seawright, 134 So. 2d 829 (Fla. 1st Dist. Ct. App. 1961), *cert. denied*, 143 So. 2d 491 (Fla. 1962)).

603. 652 So. 2d 411 (Fla. 3d Dist. Ct. App. 1995).

604. *Id.* at 412.

605. *Id.* at 413.

606. *Id.* at 412.

607. *Id.*

608. *Wasser*, 652 So. 2d at 412.

609. 648 So. 2d 1239 (Fla. 5th Dist. Ct. App. 1995). This case was also discussed previously in Part VI with regard to the issues relating to construction. *See supra* text accompanying notes 79-86.

flooded the house and caused physical damage to the home and its contents. The Hummels sued the builder for fraud, negligent misrepresentation with regard to the elevation and drainage capability of the property, as well as breach of contract.[610] The Hummels also sued the City of Sanford for negligence in approving the plans and inspecting the builder's work, for breach of the City's warranties contained in the certificate of occupancy, and for negligent operation and maintenance of its stormwater drainage system.[611] The City asserted sovereign immunity and argued that it did not owe a duty to the plaintiffs.[612] The Fifth District Court of Appeal affirmed the trial court's dismissal of the Hummel's claims against the City for negligence in approving the plans and inspecting the construction, as well as the claims for breach of warranties based on the certificate of occupancy.[613] The court, quoting *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*,[614] stated:

> We find no indication that chapter 553 [Building Construction Standards] was intended as a means to guarantee the quality of buildings for individual property owners or developers. We find that the enforcement of building codes and ordinances is for the purpose of protecting the health and safety of the public, not the personal or property interests of individual citizens . . . .[615]

The Fifth District Court of Appeal reversed the trial court's dismissal of the plaintiff's action based on its failure to maintain and operate its stormwater drainage system. The Hummels were permitted to amend their defective complaint to state a cause of action under the precedent of *Slemp v. City of North Miami*,[616] which held that such actions may be brought against municipalities if their drainage systems fail to operate as intended, or do not meet the standards required by the building codes.[617]

610. *Id.* at 1240.
611. *Id.*
612. *Id.*
613. *Id.* at 1240-41.
614. 468 So. 2d 912, 922-23 (Fla. 1985).
615. *Hummel*, 648 So. 2d at 1240 (quoting *Trianon Park Condominium Ass'n.*, 468 So. 2d 912, 922-23 (Fla. 1985)).
616. 545 So. 2d 256 (Fla. 1989).
617. *Hummel*, 648 So. 2d at 1240-41.

XXVIII. TAX DEED SALES

DeMario v. Franklin Mortgage & Investment Co., Inc.[618] Demario and the other appellants were lienholders of an unsatisfied mortgage on a property sold in a tax deed sale. They appealed a partial summary judgment awarding $125,000 in surplus funds from the sale to Franklin Mortgage, the last title holder of record.[619] The Fourth District Court of Appeal reversed, holding that the appellants had a superior claim to the surplus funds.[620]

The facts are fairly interesting. DeMario sold the subject parcel of land on Worth Avenue in Palm Beach to a Franklin DeMarco in 1986 for $3,150,000. DeMarco paid $900,000 down and DeMario took back a four year, $4,250,000 note secured by a purchase money first mortgage. In 1990, DeMarco defaulted and DeMario foreclosed. In 1991, the parties entered into a settlement and escrow agreement under which DeMarco was given six months to perform his obligations under the note and mortgage.[621] DeMarco was required to quitclaim the property to an escrow agent, who would convey the property to DeMario if DeMarco failed to perform. However, DeMarco was given further extensions. Somehow, DeMarco was still able to quitclaim the property from himself to the appellee, an insolvent real estate company in which DeMarco was the sole shareholder. The investment company paid no consideration for the property. Furthermore, this rendered the escrowed deed ineffective because it fell outside the property's chain of title.

After the last day of the extension passed without payment, DeMario proceeded with foreclosure. The court granted summary judgment for DeMario, but delayed entry of judgment based on DeMarco's assertion that he had a buyer for the property. Franklin Investment, the quitclaim grantee, then for filed bankruptcy in the United States Bankruptcy Court for the District of Columbia, resulting in an automatic stay of the foreclosure proceeding. The bankruptcy court later dismissed Franklin Investment's petition, finding it constituted a substantial abuse of process and that it was filed in bad faith as a delay tactic.

However, before the foreclosure could be completed, because neither party paid $355,002.39 in property taxes that had accrued, the property was sold at a tax sale. The buyer at the tax sale purchased the property for a

618. 648 So. 2d 210 (Fla. 4th Dist. Ct. App. 1994).
619. *Id.* at 211.
620. *Id.*
621. *Id.*

bargain price of $350,010, leaving a $125,000 surplus. The clerk of court issued a notarized written notice to all persons having an interest in the property according to the abstract of title. The notice required that anyone claiming the surplus funds must submit a notarized written claim within ninety days. DeMario's wife submitted an unnotarized claim which was rejected. DeMarco submitted a timely notarized claim. DeMario's attorney then filed a notarized claim one day after the ninety-day deadline had expired. The trial court refused to recognize DeMario's late claim.[622]

The Fourth District Court of Appeal referred to *Florida Statutes*, chapter 197, sections 197.582(2), 197.473, 197.502(4) and 197.522(1)(a), and rule 12D-13.065 of the *Florida Administrative Code,* and held that the applicable statute of limitations for claims to surplus funds in a tax deed sale is two years.[623] The court held that the notarized statement of claim required by rule 12D-13.065(4) does not impose a ninety-day claims bar for persons otherwise entitled to distribution of surplus tax sale proceeds.[624] In such instances, if a "particular lien appears to be entitled to priority and the lienholder has not come forward and made a claim to the excess funds, payment cannot be made to other junior lienholders . . . and the clerk should initiate an interpleader action . . . ."[625]

In this case, an interpleader action was not required because the appellants had filed their claim, albeit on the ninety-first day.[626] Additionally, the ninety-day time period refers only to the amount of time the clerk must hold the proceeds before turning them over to the board of county commissioners. The board of county commissioners can keep the funds only after two years have passed. Therefore, the DeMarios were entitled to the surplus.[627]

XXIX. TAXATION OF REAL PROPERTY

City of Punta Gorda v. Burnt Store Hotel, Inc.[628] The City of Punta Gorda appealed an order determining that a capacity increase fee was actually an illegal tax. The issue arose from a utility contract between the City and the hotel, which had purchased an existing hotel property that was

622. *Id.* at 212.
623. *DeMario*, 648 So. 2d at 212.
624. *Id.* at 213.
625. *Id.*
626. *Id.* at 213-14.
627. *Id.* at 214.
628. 639 So. 2d 679 (Fla. 2d Dist. Ct. App. 1994). This case was discussed previously in Part XVI with regard to land use planning. *See supra* text accompanying notes 347-50.

connected to the City's water and sewer system. As a new utility customer, the hotel was required to sign an agreement to pay for increases in average consumption, also known as an impact fee.[629] Due to increased consumption, the hotel was charged $154,000. The City argued that the costs of increased consumption should be charged to the party responsible for the increased consumption. The hotel argued that because the newly acquired property had not been changed structurally and existed in the same capacity as it had under previous ownership, the City had already accounted for all new increases.[630]

The court affirmed the lower court's order ruling that the impact fee was an illegal tax.[631] The court stated that impact fees are justified when there is a nexus between new construction and a population increase (increased consumption) that will affect the infrastructure and require additional capital expenditure.[632] The court noted, "[c]hange of ownership of an existing business does not provide the required nexus even though the continuation of the business results in increased usage."[633] Additionally, in dicta, the court reaffirmed the proposition in *City of Tarpon Springs v. Tarpon Springs Arcade, Ltd.*,[634] that structural changes alone are also insufficient to justify an impact fee when there is no showing of additional usage. The present case would add "and vice versa" to the above proposition.

Davis v. St. Joe Paper Co.[635] Richard Davis, property appraiser of Bay County, along with Larry Fuchs, Executive Director of the Department of Revenue, appealed the lower court's decision reversing the property appraiser's denial of an agricultural use classification for property owned by the St. Joe Paper Company.[636] Section 193.461 (3)(b) of the *Florida Statutes*, states that lands must be used primarily for "bona fide agricultural purposes" in order to be classified as agricultural. The court noted that, "bona fide agricultural purposes" means good faith commercial agricultural use of the land. Section 193.461 sets forth factors to be considered in making the determination. The First District Court of Appeal held that the property owner failed to show that the property appraiser did not consider

629. *Id.* at 679-80.
630. *Id.* at 680.
631. *Id.*
632. *Id.*
633. *Punta Gorda*, 639 So. 2d at 680.
634. 585 So. 2d 324 (Fla. 2d Dist. Ct. App. 1991).
635. 652 So. 2d 907 (Fla. 1st Dist. Ct. App. 1995).
636. *Id.* at 908.

the statutory factors or no reasonable hypothesis supported the appraiser's determination that the subject property was not primarily used for bona fide agricultural purposes.[637] Consequently, the court reversed and remanded.[638]

Florida Department of Revenue v. Canaveral Port Authority[639] The Fifth District Court of Appeal held that the Canaveral Port Authority, created in 1953 by special act of the legislature for the purpose of operating the port in Brevard County, was not exempt from ad valorem taxation on portions of property leased to nongovernmental lessees who were not performing a governmental-exempt function.[640]

The court stated that political subdivisions, such as counties, are immune from taxation.[641] However, a business-type organization lacking the usual incidents and powers of a governmental subdivision will not be immune, and may not even be exempt, from taxation.[642] The distinguishing quality is that political subdivisions are a branch of the general administration of the policy of the state, as in the case of school boards, state agencies, and departments.[643] The court held that the Canaveral Port Authority did not fit this description, and therefore, was not immune from taxation.[644] The court recognized that the Port does have an exemption, but it only applied to property used for government purposes.[645]

Florida Manufactured Housing Ass'n, Inc. v. Department of Revenue.[646] The Florida Manufactured Housing Association ("FMHA"), filed a petition to the Division of Administrative Hearings to challenge proposed *Florida Administrative Code* rules 12D-6.001 and 12D-6.002, which deal with the taxation of mobile homes, on grounds that section 193.075 of the *Florida Statutes* violates the constitutional prohibition against ad valorem taxation of mobile homes. The petition was denied and FMHA appealed.[647]

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637. *Id.* at 909.
638. *Id.*
639. 642 So. 2d 1097 (Fla. 5th Dist. Ct. App. 1994).
640. *Id.* at 1103.
641. *Id.* at 1099.
642. *Id.* at 1100-01.
643. *Id.* at 1101.
644. *Canaveral Port Auth.*, 642 So. 2d at 1101-02.
645. *Id.* at 1103.
646. 642 So. 2d 626 (Fla. 1st Dist. Ct. App. 1994).
647. *Id.* at 626-27.

The First District Court of Appeal affirmed, rejecting the argument that section 193.075 of the *Florida Statutes* is unconstitutional.[648] The court noted that "[a]rticle VII, section (b) of the Florida Constitution provides that 'mobile homes, as defined by law, . . . shall not be subject to ad valorem taxes.'"[649] Section 193.075, as amended in 1991, takes mobile homes which are permanently affixed to land owned by the mobile home owner out of the definition of mobile homes. Therefore, by changing the definition of mobile homes, they are now subject to ad valorem taxation.[650]

Judge Benton concurred to point out that since the litigation began, the relevant administrative rules were amended to deal with what FMHA was most concerned about, ad valorem taxation of mobile homes inventoried by dealers and manufacturers on grounds that they were permanently affixed to realty.[651] Dealers often have models or samples on display which are anchored down. The court noted that, "[a] mobile home that is taxed as real property shall be issued an 'RP' series sticker as provided in [section] 320.0815."[652]

Green v. Greider.[653] Section 125.0104 of the *Florida Statutes* authorizes any county to levy a tourist development tax on leases of certain living accommodations for a term of six months or less. The Clerk of the Lee County Circuit Court imposed such a tax on the appellee's rental condominium units. The appellee responded to this tax by making the leases last for six months and one day. The Clerk sued and the trial court held that the tax could not be imposed on the appellee's units because of the manipulated lease terms. The Clerk appealed, arguing that the six-month-and-one-day terms were in effect shorter because the lessees paid the same amount and did not occupy the units for the full term. The Second District Court of Appeal disagreed and affirmed the trial court's decision denying the imposition of the tax.[654]

Sebring Airport Authority v. McIntyre.[655] The Sebring Airport Authority is a legislatively created public body. From 1970 to 1991, it promoted and operated the "12 Hours of Sebring" on its property. In 1991, the Authority leased the raceway to "Sebring International Raceway," a

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648. *Id.* at 627.
649. *Id.* (emphasis omitted).
650. *Id.*
651. *Florida Manufactured Hous. Ass'n, Inc.*, 642 So. 2d at 627 (Benton, J., concurring).
652. *Id.* (quoting FLA. STAT. § 193.075(1) (1993)).
653. 645 So. 2d 591 (Fla. 2d Dist. Ct. App. 1994).
654. *Id.*
655. 642 So. 2d 1072 (Fla. 1994).

for-profit corporation. The Highlands County Property Appraiser assessed and levied ad valorem real property taxes on the leased property. The Raceway corporation sought an exemption under section 196.199(2)(a) of the *Florida Statutes*, arguing that the property was being used to further a public purpose, as it had been from 1970 through 1991. In the litigation that ensued, both the trial court and the district court of appeal denied the exemption.[656]

The supreme court first set out the general principle that all property is subject to taxation unless expressly exempt and such exemptions are strictly construed against the party claiming them.[657] Then the court analyzed section 196.199(2)(a). The court held that the exemptions contemplated under that subsection of the statute relate to "governmental-governmental" functions as opposed to "governmental-proprietary" functions.[658] The former deals with use of governmental property by non-governmental entities to perform functions which would otherwise be within the traditional administrative duties of the government. The latter deals with use of governmental property by non-governmental entities to carry on functions which are for the profit of the non-governmental entity and would not fall within the valid functions of the government. Although the distinction is not clearcut, the court stated that no exemption is granted to nongovernmental lessees of governmental property when the lessee uses the property for governmental-proprietary purposes.[659] Therefore, because the raceway corporation, as a for-profit lessee, was leasing the property for governmental-proprietary purposes, it was not entitled to an exemption from property taxes.[660] Government-owned property is subject to tax if leased to a private party for that party's own profit aims.[661]

Wilkinson v. Kirby.[662] The Lee County Property Appraiser, Kenneth Wilkinson, and the Lee County Tax Collector appealed judgments granting an agricultural classification under section 193.461 of the *Florida Statutes* to Larry Kirby, the trustee of a land trust in Cape Coral. The land was originally intended to be developed into a planned unit development, but was later used as a tree farm when the prospects for development weakened.

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656. *Id.* at 1073.
657. *Id.*
658. *Id.*
659. *Id.* at 1074.
660. *Sebring Airport Auth.*, 642 So. 2d at 1074.
661. *Id.* at 1073.
662. 654 So. 2d 194 (Fla. 2d Dist. Ct. App. 1995).

In 1991, the trust applied for an agricultural classification, which the Property Appraiser denied.[663] The County Value Adjustment Board denied an appeal and Kirby filed suit.[664] The trial court found that in 1991, eighteen acres had been used for bona fide agricultural purposes, and in 1992 that number rose to twenty-four acres.[665] The Property Appraiser argued that under section 193.461, which sets out the factors for determining bona fide agricultural purpose and includes a catch all, the zoning classification was relevant. Here, the property had been zoned for most of the time as planned unit, also known as PU, and was currently rezoned as residential development, also known as RD. The court stated that this was not important because the land was not zoned agricultural even when the trust purchased it.[666] The Property Appraiser also pointed to the lack of profitability as a factor. The land trust which owned the farm transferred trees to related corporations without generating income. The court stated that the tree farm still had a profit motive and was not a sham.[667] Therefore, the court affirmed the agricultural classification of the land.[668]

XXX. USURY

Jersey Palm-Gross, Inc. v. Paper.[669] Jersey Palm-Gross, a real estate developer, made a loan to the defendant real estate partnership. The loan amount was $200,000, and the interest rate was fifteen percent for eighteen months, amounting to $45,000 in interest charges. The developer/lender also demanded a fifteen percent equity interest in the partnership. The court valued the partnership at $600,000.[670] The borrowers agreed to grant the equity interest, not being in a position to bargain or seek other financing. Therefore, the total charge for the loan was fifteen percent of $600,000, which equals $90,000, plus $45,000, which equals $135,000. The $200,000 loan cost $135,000, which is equivalent to a forty-five percent per annum interest rate over the eighteen month term of the loan. The loan seems to have been a mix between equity sharing and a participating mortgage. The

663. *Id.* at 196.
664. *Id.*
665. *Id.*
666. *Wilkinson*, 654 So. 2d at 196.
667. *Id.* at 197.
668. *Id.*
669. 639 So. 2d 664 (Fla. 4th Dist. Ct. App. 1994).
670. *Id.* at 667.

lender did not want to be a joint venturer, but did want a portion of the equity in addition to its interest charge.

The borrowers defaulted, the developer/lender sued, and the borrowers made a usury defense, arguing the debt was unenforceable because they were being charged what amounted to forty-five percent per annum in interest. The trial court held in favor of the borrowers, finding usury, and the lender appealed.[671]

The court discussed usury law as stated in chapter 687 of the *Florida Statutes*. The cause of action has four elements:

> 1. A loan, either express or implied.
> 2. An understanding that the money must be repaid.
> 3. In consideration of the loan, a greater rate of interest than is allowed by law is paid or agreed to be paid by the borrower.
> 4. Intent to charge a usurious rate, sometimes referred to as corrupt intent.[672]

The intent is determined by looking at all the surrounding circumstances, including looking beyond just the loan documents.

Civil usury involves loans of $500,000 or less, and an interest rate greater than eighteen percent, but less than twenty-five percent. Whereas criminal usury involves any loan amount with a rate of interest greater than twenty-five percent, but less than forty-five percent. Penalties for civil usury include forfeiture of all interest charged. If the usury rises to the level of criminal usury, the penalties include the forfeiture of the right to collect the debt.[673]

In this case the first three elements were conceded by the lender. The lender argued a lack of usurious intent and pointed to a "usury savings clause" in the note. The clause disclaimed intent and would automatically amend the transaction to remove any charges deemed by a court to be usurious. The court held that the lender had knowledge of the amount charged for the loan, which established the intent element.[674] Therefore, "usurious intent" means purpose or knowledge in the way of consciousness, and not necessarily ill will or corrupt motive.[675] The intent is not negated as a matter of law by the insertion of a disclaimer of usurious intent in the

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671. *Id.* at 666.
672. *Id.* (citations omitted).
673. *Id.* at 667.
674. *Jersey Palm-Gross*, 639 So. 2d at 668.
675. *Id.*

note, at least in the case of transactions which are usurious at the outset. The only way a lender can be certain to defeat a claim of usury is through section 687.04(2), which requires the lender to take affirmative action to notify and refund the overcharge *before* the borrower raises the claim of usury in litigation.[676] Of course, this section applies to civil, not criminal usury.[677] Here, because the amount charged exceeded the usury limit from the outset, and exceeded the limit by so much, the court found the savings clause of little weight and affirmed the trial court's judgment for the borrowers.[678]

The dissent, which even quotes Polonius in *Hamlet*, disagreed and questioned the valuation of the fifteen percent equity interest in the partnership, which was the charge which made the transaction usurious.[679] The partnership was arguably fully leveraged, and therefore, there was really no equity. Thus, the fifteen percent interest was not worth anything at the outset. The argument makes sense because it is generally agreed that money, which is not absolutely payable, is not interest for usury purposes. However, the elements of the cause of action as listed by the court do not emphasize this concept. The fifteen percent partnership interest was not absolutely payable. Rather, it was contingent on the presence of real equity, and there was no such showing.

XXXI. WATER AND WATER COURSES

Macnamara v. Kissimmee River Valley Sportsman's Ass'n.[680] Macnamara, a riparian owner, fenced-off a spoil island. Section 253.12(1) of the *Florida Statutes* and article X, section 11 of the *Florida Constitution* provide that spoil islands and navigable waters are public lands held by the state in trust for public use and enjoyment. The island in question was formed in the 1960s from the "spoil" produced from dredging a canal as part of the Southern Florida Flood Control Project.

The Sportsmans' Association, which used the island for recreation, sued as relator for the State of Florida. The title holder of the spoil island, the Internal Improvement Trust Fund, intervened on their side. The court held

676. *Id.* at 670.
677. *Id.*
678. *Id.* at 671.
679. *Jersey Palm-Gross*, 639 So. 2d at 672 (Farmer, J., dissenting).
680. 648 So. 2d 155 (Fla. 2d Dist. Ct. App. 1994).

that the association had standing as a representative of the people in a quo warranto proceeding.[681]

The issue was whether the island was within the water boundary of Macnamara's lots. Macnamara's lots are government lots. The water boundary of government lots is the "ordinary high water boundary," meaning, the true line of ordinary high water, and not the meander line plotted by the public lands surveyors.[682]

The boundary usually results in the land boundary extending less into the water than when meander lines are used. Using the high water boundary the area fenced off was beyond the land boundary and into the "federal navigation servitude."[683]

Private riparian owners can exclude the public from portions of lakes that have been the subject of sovereignty sales. However, Macnamara did not buy the lake bottoms from the State, and thus could not exclude the public. Therefore, the court ordered Macnamara to remove the fence.[684]

Macnamara made an estoppel argument that he was granted a permit from the Army Corps of Engineers, and obtained verbal approval from the Department of Natural Resources, the Department of Environmental Regulation, and the Water Management District.[685] Macnamara also claimed that he paid ad valorem taxes on the fenced land. The court held that estoppel did not apply because Macnamara had not relied on any positive act from an authorized official. Furthermore, taxes had not been assessed on the area in question because the assessors relied on meander line boundaries.[686]

XXXII. CONCLUSION

The foregoing survey of cases and legislation presents selected materials of significance to real estate professionals. One thing is clear: there is no shortage of litigation in the real estate area, although there seems to be no consistent pattern to the case law and legislative development.

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681. *Id.* at 163.

682. Meander lines are a series of straight lines intended to approximate the shoreline. Boundaries figured using meander lines will be different from the "ordinary high water boundary," which is figured by a straight line marked at the furthest point actually exposed at the high water mark.

683. *Id.* at 162.

684. *Id.* at 165.

685. *Id.* at 162-63.

686. *MacNamara*, 648 So. 2d at 163.

Torts: 1995 Survey of Florida Law

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TABLE OF CONTENTS

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I. INTRODUCTION

The last year has been an explosive one in the tort arena. In lawyer advertising, "Went For It" went for it, but the Supreme Court of the United States did not. Defendants "discovered" more discovery from non-parties, and an expert's expertise was expertly blocked when plaintiffs were barred from seeking to obtain certain financial discovery from defendants' experts. With regard to the psychotherapist-patient privilege, we learned that just because you say it doesn't mean they get it. We were also educated on the "fees"ability of obtaining attorney's fees, whether or not you had a reservation. On bringing certain claims after they have previously been adjudicated, the "res" is history.

The "*Fabre* monster" reared its ugly head, but two state supreme court justices nearly stabbed it to death. The court took another bite out of dog owners and warned physicians once again about the "duty to warn." We learned that you don't always win with the "economic loss rule," and that you still need to make an "impact" to succeed in certain tort cases. Another court gave life to wrongful death cases involving a fetus. We were informed that the "misuse" absolute defense is absolutely dead in products liability cases. The Florida Department of Corrections learned that they won't get away with an escapee getting away. With regard to the seatbelt defense, we buckled down on buckling up, as *Bulldog* remained the big dog in town. "You got without having," as our supreme court eliminated the need for permanent injury to recover in tort. We were told that absolute immunity absolutely immunized a party in certain situations. Finding voluntary dismissal different from an adjudication on the merits, we were informed that just because you're done doesn't mean you're finished. Although lawyers are talented people, they were unable in contribution cases to make ten equal one hundred. Our supreme court stated that it is no longer fairly debatable that it is fairly debatable, and we saw insurance companies come out from hiding (behind defendants). We learned that you should not "prejudge" the "interest"ing prejudgment development, and courts expressed the vitality of implied covenants. We close with the punitive warning that you may be damaged if you damage others.

II. PERSONAL INJURY SOLICITATION: "*WENT FOR IT*" CAN'T GO FOR IT

Rules 4-7.4(b)(1) and 4-7.8(a) of the *Rules Regulating the Florida Bar* prohibit personal injury lawyers from engaging in targeted direct-mail

solicitation to victims or their relatives until at least thirty days following an accident or disaster.[1] The rules also prevent a lawyer from accepting a referral of a client that has been solicited in such a manner.[2] The Supreme Court of the United States in *Florida Bar v. Went For It, Inc.*[3] upheld this restriction, finding that lawyer solicitation was commercial speech entitled only to limited First Amendment protection.[4]

The Court found that the restriction satisfied all three prongs of the intermediate scrutiny test.[5] More particularly, the Court reasoned that 1) the Bar had a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers;[6] 2) the harms targeted by the prohibition were real,

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1. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2374 (1995). The rules at issue in *Florida Bar* prohibited lawyers from soliciting victims, or relatives of victims, by means of targeted direct-mail advertising for 30 days following a disaster or accepting a referral for a client that had been solicited in such a manner. R. REGULATING FLA. BAR 4-7.4, 4-7.8.

2. *Florida Bar*, 115 S. Ct. at 2374.

3. *Id.* In March of 1992, G. Stewart McHenry, an attorney, and his lawyer referral service, Went For It, Inc., claimed that the restriction of their direct-mail campaign was a violation of the First and Fourteenth Amendments in their action for declaratory and injunctive relief. *Id.* Before trial, another Florida lawyer, John Blakely, was substituted in McHenry's place. *Id.* The district court entered summary judgment for the plaintiffs, and the Eleventh Circuit affirmed based upon Bates v. State Bar of Ariz., 433 U.S. 350 (1977), and its progeny. *Florida Bar*, 115 S. Ct. at 2374-75. The Court, however, noted that it was "'disturbed that *Bates* and its progeny require[d] the decision' that it reached." *Id.* at 2375 (quoting *Florida Bar*, 21 F.3d 1038 (11th Cir. 1994)).

4. *Id.* In 1989, the Florida Bar completed a two-year study regarding the effects of lawyer advertising on public opinion and determined that changes to the rules governing lawyer solicitation were required. *Id.* at 2374. In 1990, the Supreme Court of Florida adopted the Bar's proposed amendments. *Id.* (citing The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar Advertising Issues, 571 So. 2d 451 (Fla. 1990)).

5. *Florida Bar*, 115 S. Ct. at 2376-81. The three-prong test is taken from Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980). *Florida Bar*, 115 S. Ct. at 2376. In *Central Hudson*, the Court stated that if commercial speech is not misleading and does not concern unlawful activity, then it may be freely regulated if: 1) the government asserts a substantial interest in support of regulating the commercial speech; 2) the government demonstrates that the restriction directly and materially advances that interest; and 3) the regulation is narrowly drawn. *Central Hudson*, 447 U.S. at 564-65.

6. The Court had "little trouble" finding a substantial interest for the Bar's regulation, citing Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975), among others. *Florida Bar*, 115 S. Ct. at 2376.

demonstrable, and sufficient to justify restriction of such speech;[7] and 3) the ban's scope was reasonably well-tailored to meet the stated objectives.[8]

The dissent[9] asserted that the majority misapplied *Shapero v. Kentucky Bar Ass'n*[10] and that the three-prong test of *Central Hudson* was not met.[11] It found the first prong was not satisfied because the *Shapero* case—which approved a similar form of advertising—was indistinguishable from the case at bar.[12] The dissent asserted the second prong of *Central Hudson* was *not* met either, in that the restriction on speech did not support the state's asserted interest in a direct and material way.[13] Finally, according to the four justices, the third prong was not met because "the relationship between the Bar's interests and the means chosen to serve them [was] not a reasonable fit."[14]

III. DISCOVERY

A. *"What's Up Doc?"*

Reiterating the general discovery rule of nondisclosure of the names of a private physician's patients who are not parties to the action, the First

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7. The Court distinguished Edenfeld v. Fane, 113 S. Ct. 1792 (1993), finding that contrary to the 106-page study proffered in *Florida Bar*, the State Board of Accountancy in *Edenfeld* had presented no studies in support of its regulation. *Florida Bar*, 115 S. Ct. at 2377. In fact, the Court found "the only evidence in the record tended to 'contradic[t] rather than strengthe[n] the Board's submissions.'" *Id.* (quoting *Edenfeld*, 113 S. Ct. at 1801). Therefore, the Court invalidated the regulation banning in-person solicitation by C.P.A's. *Id.*

8. *Id.* at 2380. The 30-day waiting period was not overly restrictive and numerous alternatives exist to direct-mail solicitation in order for injured parties to become aware of legal representation. *Id.* However, the Court admitted it may have had greater difficulty in upholding the Florida Bar rules had the restriction not been limited to a brief period, and if other ways to learn about the availability of legal representation had not existed. *Florida Bar*, 115 S. Ct. at 2380.

9. The dissenting opinion was authored by Justice Kennedy, joined by Justices Stevens, Souter, and Ginsberg. *Id.* at 2381.

10. 486 U.S. 466 (1988).

11. *Florida Bar*, 115 S. Ct. at 2382-86.

12. *Id.* at 2382-83. The dissent's principal disagreement in this regard was based on the finding in *Shapero* that direct-mail advertising was not "overreaching and undue influence." *Id.* at 2382.

13. *Id.* at 2383-84.

14. *Id.* at 2384. The dissent described the Florida Bar's rule as a "flat ban" which prohibited more speech than necessary to achieve the state's purported interest. *Florida Bar*, 115 S. Ct. at 2384.

District Court of Appeal in *Staman v. Lipman*[15] held that non-party patients have a privacy interest in not having their names revealed in a medical malpractice action.[16] The court reasoned that the names of the non-party patients of the private physician are not relevant to 1) whether the defendant physician obtained informed consent from the plaintiff or 2) whether he deviated from the community standard of care while treating the plaintiff.[17] In refusing to allow discovery of the doctor's sign-in logs in *Staman*, the court distinguished *Big Son Health Care Systems, Inc. v. Prescott*,[18] on the basis that the discovery of hospital records (i.e., emergency room sign-in records) in that case were subject to limited disclosure by statute.[19]

Interestingly, the Supreme Court of Florida, in *Amente v. Newman*,[20] held *Florida Statutes* section 455.241(2) *inapplicable* to requests for complete medical records, as long as those medical records are properly redacted so as to protect the patient's identity.[21] The court found no violation of the patients' rights of privacy where all identifying information

15. 641 So. 2d 453 (Fla. 1st Dist. Ct. App. 1994). *Staman* concerned sign-in logs from a physician's private office, where disclosure of the patients' names would not only violate those non-party patients' privacy interests but allegedly would cause irreparable injury to the physician's professional reputation. *Id.* at 455.

16. *Id.*

17. *Id.*

18. 582 So. 2d 756, 758 (Fla. 5th Dist. Ct. App. 1991) (holding hospital sign-in logs containing limited information are discoverable because patients listed on them have no reasonable expectation of privacy with respect to the logs since any other patient who signs in could view the names of patients who signed previously).

19. *Staman*, 641 So. 2d at 454-55 (citing *Prescott*, 582 So. 2d at 758). Chief Judge Zehmer dissented, asserting that there was no privacy interest in allowing disclosure of the names appearing on the "sign-in" log, as they were "open and available for inspection by all persons who signed in at the doctor's office on a given day." *Id.* at 455 (Zehmer, J., dissenting).

20. 653 So. 2d 1030 (Fla. 1995).

21. *Id.* at 1032

was eliminated,[22] but conceded that there may be circumstances where the privacy of one's medical records would be constitutionally protected.[23]

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22. *Id.* at 1033. The court approved Amisub, Inc. v. Kemper, 543 So. 2d 470 (Fla. 4th Dist. Ct. App. 1989), and Ventimiglia *ex rel.* Ventimiglia v. Moffit, 502 So. 2d 14 (Fla. 4th Dist. Ct. App. 1986), but expressly disapproved the following cases: Leikensohn v. Cornwell, 434 So. 2d 1030, 1030-31 (Fla. 2d Dist. Ct. App. 1983) (holding medical malpractice defendant could not be compelled to answer interrogatory which requested non-party patient's initials, date of surgery, and name of hospital where surgery was performed); North Miami Gen. Hosp. v. Royal Palm Beach Colony, Inc., 397 So. 2d 1033, 1035 (Fla. 3d Dist. Ct. App. 1981) (holding hospital was not required to answer interrogatory concerning hospitalization records of patients not involved in the suit because this would "impermissibly compromise their right to the confidentiality of their medical records"); Teperson v. Donato, 371 So. 2d 703, 704 (Fla. 3d Dist. Ct. App. 1979) (holding order requiring production of non-parties' medical records was error because the question of medical malpractice is whether the doctor used a standard of care commensurate with that used in the community, and this question can be answered by methods other than invading the medical records of strangers); and Argonaut Ins. Co. v. Peralta, 358 So. 2d 232, 233 (Fla. 3d Dist. Ct. App.) (holding order requiring production of medical records and photographs of non-parties was in error because "to permit a party to inject into the public record medical information of a stranger to the suit, under the guise that it has a bearing on the competency of the doctor, would be unconscionable"), *cert. denied*, 364 So. 2d 889 (Fla. 1978).

23. *Amente*, 653 So. 2d at 1033. The impact of this decision is evident in Bassette v. Health Management Resources Corp., 20 Fla. L. Weekly D1938 (Fla. 2d Dist. Ct. App. Aug. 23, 1995). In this case, the plaintiff alleged she suffered physical and psychological injuries from the purchase and consumption of a powdered diet food product. Thereafter, the respondent, Health Management, sought and was granted non-party discovery of the medical records of Dr. Bassette, the father of the plaintiff, on the basis of its assertion that such discovery would be useful in confirming whether there is a history of depression or other mental illnesses in plaintiff's family. *Id.* at D1938. The Second District Court of Appeal held that "[j]ust because one family member files a lawsuit that places her medical condition at issue does not mean that the medical history of her entire, or even immediate family, becomes relevant for discovery purposes." *Id.* For another case addressing the issue of the disclosure of a non-party's medical records, see *In re* Fink, 876 F.2d 84, 85 (11th Cir. 1989) (applying Florida law in granting writ of mandamus to prohibit the discovery of medical records of non-parties, also stating that "[t]he Florida courts have consistently refused to permit discovery of the medical records of non-parties to an action"); *accord* Dierick v. Cottage Hosp. Corp., 393 N.W.2d 564, 567 (Mich. Ct. App. 1986) (stating that although medical records relating to the patient's siblings might have been relevant to the defendant's theory of a genetically transmitted defect, the records were privileged and not subject to discovery).

B. *A Prescription for Compulsion*

A plaintiff can be compelled to sign, execute, and deliver medical authorization forms to the defendant so as to allow the defendant to directly obtain the plaintiff's out-of-state medical records. In *Rojas v. Ryder Truck Rental, Inc.*,[24] the plaintiffs, residents of Massachusetts, sustained injuries in an auto accident that occurred in Florida.[25] The plaintiffs filed suit seeking damages for their injuries and for aggravation of other previously existing medical conditions.[26] When the defendant was unsuccessful in obtaining discovery of the plaintiffs' Massachusetts medical records, they petitioned the court to compel such discovery.[27] The court's ruling required the plaintiff to execute a blank medical authorization form, without requiring the defendants to institute a separate action in Massachusetts.[28] The court apparently treated the Massachusetts medical providers like Florida residents, reasoning that this discovery method provided the most practical and least burdensome method for obtaining the records, in that neither party should be placed in a different position or be prejudiced just because a medical facility is located out-of-state.[29] The court also noted that the out-of-state medical records requested by the defendants were "non-

24. 641 So. 2d 855 (Fla. 1994).

25. *Id.* at 856.

26. *Id.* During discovery, the defendants attempted to obtain the plaintiffs' medical records using subpoenas filed pursuant to rule 1.351 of the *Florida Rules of Civil Procedure*. *Id.* However, the medical facilities in Massachusetts, where the plaintiffs were treated, refused to supply the records. *Id.*

27. *Rojas*, 641 So. 2d at 856.

28. *Id.* at 857.

29. *Id.* The court stated that "[i]t makes no sense to impose a more costly and time-consuming discovery process on the seeking party solely because the medical providers are located out-of-state. The rules . . . do not prohibit judges from using their discretion to fashion an appropriate remedy to obtain out-of-state records." *Id.*

privileged, potentially relevant, and discoverable documents."[30] In so holding the court harmonized *Rojas* with *Johnston v. Donnelly*[31] and *Reinhardt v. Northside Motors Inc.*[32]

C. *An Expert's Expertise Expertly Protected*

Finding oppressive and burdensome the discovery relating to independent medical examinations performed by an expert, the Third District Court of Appeal in *Syken v. Elkins*[33] prohibited discovery of information relating to 1) the defendant expert's income amount received from testifying, as well as 2) the total number of independent medical examination performed in this regard.[34] During discovery in *Syken*, the plaintiff's counsel requested that the defendant's expert witness produce documentation of the income the expert earned from independent medical examinations since January 1, 1990.[35] The court found that "[t]he production of the information ordered . . . causes annoyance and embarrassment, while providing little useful information"[36] and, therefore, discovery could be limited.[37] Although recognizing conflict with prior decisions and other district courts, the court

30. *Id.* The supreme court added that it made no sense to burden the seeking party with a discovery process which requires more time and money just because the medical providers are out-of-state residents. *Rojas*, 641 So. 2d at 857; *accord* Kennedo v. U.S., No. CV-94-2552, 1995 WL 428660, at *3 (E.D.N.Y. July 6, 1995) (holding it was inappropriate for plaintiff's attorney to interview treating psychiatrist employed by medical negligence defendant without defendant's consent).

31. 581 So. 2d 909 (Fla. 2d Dist. Ct. App. 1991) (holding execution of a blanket medical authorization release will not allow for disclosure of medical records).

32. 479 So. 2d 240 (Fla. 4th Dist. Ct. App. 1985) (denying request for execution of a medical release where the requesting party had made no known attempts to get the medical records by any other means). One wonders whether a party may use this case in other ways for the purpose of bypassing the requirements of another state's regulations.

33. 644 So. 2d 539 (Fla. 3d Dist. Ct. App. 1994).

34. *Id.* at 544-45.

35. *Id.* at 541. Apparently, the plaintiff's counsel sought these documents in an effort to demonstrate the bias of defendant's expert witness.

36. *Id.* at 545.

37. *Id.* Discovery of relevant, non-privileged information may be limited or prohibited in order to prevent annoyance, embarrassment, oppression, or undue burden or expense. FLA. R. CIV. P. 1.280(c), 1.410(b), 1.410(d)(1); *see also* South Fla. Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 801 (Fla. 3d Dist. Ct. App. 1985); *cf.* Crandall v. Michaud, 603 So. 2d 637, 639-40 (Fla. 4th Dist. Ct. App. 1992) (limiting the holding to its facts, the court said an independent medical examining doctor was not required to reveal the reports of medical examinations of patients other than plaintiff, as such disclosure was unduly burdensome in comparison with the benefit to the plaintiff).

established new guidelines[38] regarding discovery of an opposing medical expert for impeachment purposes.[39]

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38. *Syken*, 644 So. 2d at 546. Under the new guidelines, discovery of an opposing medical expert (for impeachment) is limited by the following criteria:

> 1. The medical expert may be deposed either orally or by written deposition.
>
> 2. The expert may be asked as to the pending case, what he or she has been hired to do and what the compensation is to be.
>
> 3. The expert may be asked what expert work he or she generally does. Is the work performed for the plaintiffs, defendants, or some percentage of each?
>
> 4. The expert may be asked to give an approximation of the portion of their professional time or work devoted to service as an expert. This can be a fair estimate of some reasonable and truthful component of that work, such as hours expended, or percentage of income earned from that source, or the approximate number of IME's that he or she performs in one year. The expert need not answer how much money he or she earns as an expert or how much the expert's total annual income is.
>
> 5. The expert may be required to identify specifically each case in which he or she has actually testified, whether by deposition or at trial, going back a reasonable period of time, which is normally three years. A longer period of time may be inquired into under some circumstances.
>
> 6. The production of expert's business records, files, and 1099's may be ordered produced only upon the most unusual or compelling circumstance.
>
> 7. The patient's privacy must be observed.
>
> 8. An expert may not be compelled to compile or produce nonexistent documents.

Id.

39. *Id.* at 544-45. The court noted support for its conclusion. *Id.* at 544; *see* LeJeune v. Aikin, 624 So. 2d 788, 789 (Fla. 3d Dist. Ct. App. 1993) (Schwartz, C.J., concurring specially); Trend South, Inc. v. Antomarchy, 623 So. 2d 815, 816 (Fla. 3d Dist. Ct. App.) (Jorgenson, J., dissenting) (finding that the trial court's order compelling expert witness to provide information on tax returns and other sources of income was an unreasonable "fishing expedition"), *review denied*, 630 So. 2d 1103 (Fla. 1993); *see also Ex parte* Morris, 530 So. 2d 785, 787 (Ala. 1988); Allen v. Superior Court of Contra Costa County, 198 Cal. Rptr. 737, 741 (Ct. App. 1984) (explaining that lower court abused its discretion when it required medical expert to produce documents that may have been obtained through less intrusive means); Jones v. Bordman, 759 P.2d 953, 964 (Kan. 1988) (stating that if sole purpose of discovery request is to obtain evidence which could impeach witness' veracity, then information is not discoverable, especially when party could have acquired evidence through less obtrusive means); Ede v. Atrium S. OB-GYN, Inc., 642 N.E.2d 365, 368 (Ohio 1994) (holding evidence of common insurance interests among defendant and expert witness is sufficiently probative of expert's bias to outweigh any prejudice evidence might cause); Mohn v. Hahnemann Medical College & Hosp., 515 A.2d 920, 924 (Pa. Super. Ct. 1986); Russell v. Young, 452 S.W.2d 434, 435 (Tex. 1970) (reasoning that non-party witness' records are not discoverable prior to trial if sought for purposes of impeaching witness).

D. *Just Because I Said It Doesn't Mean You Get It*

A party's right to invoke the psychotherapist-patient privilege does not necessarily terminate because others are aware that the party was receiving treatment.[40] In *Yarborough v. Lewis*,[41] the Second District Court of Appeal found the defendant's right to invoke the psychotherapist-patient privilege was protected, notwithstanding that plaintiff admitted during a deposition that his family, physician, associates, office staff, and some friends were aware of his hospitalization.[42] The court distinguished *H.J.M., M.D., P.A. v. B.R.C. & R.H.C.*,[43] a case that found a waiver can occur through disclosure, finding it not to be controlling where a party consistently and frequently asserted the privilege prior to complying with any court order.[44]

E. *You Can't Party on a Non-party*

The Department of Insurance is not considered a "defendant" for purposes of service under rule 1.070 of the *Florida Rules of Civil Proce-*

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40. Yarborough v. Lewis, 652 So. 2d 834 (Fla. 2d Dist. Ct. App. 1994). *But see* Nelson v. Womble, 657 So. 2d 1221, 1222 (Fla. 5th Dist. Ct. App. 1995) (holding that there is no privilege for discovery of psychological records where mental and emotional condition is at issue); Castillo-Plaza, M.D. v. Green, 655 So. 2d 197, 200 (Fla. 3d Dist. Ct. App. 1995) (explaining statutory privilege of doctor-patient confidentiality does not apply in a medical negligence action where a health care provider is or reasonably expects to be named as a defendant). The *Castillo-Plaza* court reasoned that even if the statutory privilege under § 455.241(2) applied, the trial court could not preclude ex parte conversations between defense counsel and the plaintiff's non-party treating physician on unprivileged subjects by restricting counsel to formal discovery. *Castillo-Plaza*, 655 So. 2d at 202.

41. 652 So. 2d 834 (Fla. 2d Dist. Ct. App. 1994).

42. *Id.* at 835. In *Yarborough*, the defendant was being sued for medical malpractice arising out of a surgery. The plaintiff never alleged that the defendant's negligence or failure to obtain the patient's informed consent was the result of the defendant's impairment due to drugs or alcohol. Nevertheless, the plaintiff attempted to obtain any information relating to defendant's drug and alcohol abuse through interrogatories and production requests. During the defendant's deposition, he admitted having been treated at a medical facility for alcohol use for one month in 1991. *Id.* at 834.

43. 603 So. 2d 1331 (Fla. 1st Dist. Ct. App.), *review denied*, 613 So. 2d 834 (Fla. 1992).

44. *Yarborough*, 652 So. 2d at 835. In *H.J.M.*, the defendant admitted to participating in a substance abuse program while being deposed. *H.J.M.*, 603 So. 2d at 1332. The First District Court of Appeal concluded the defendant had "effectively waived the psychotherapist-patient privilege" because he provided part of the information ordered disclosed by the court before he raised any objection to such an order. *Id.* at 1334.

dure. In *Turner v. Gallagher*,[45] the court defined "defendant" as "a party named in a lawsuit against whom some type of relief or recovery is sought or who claims an interest adverse to the plaintiff."[46] Since the Department of Insurance in *Turner* was not named as a "defendant," it did not have to be served with process within 120 days of the filing of the initial complaint.[47] The court also found that chapter 768 does not require the Department of Insurance to be made a "party" to an action, presumably because relief in such cases is not sought or obtained from the Department.[48]

IV. OFFER OF JUDGMENT & ATTORNEY'S FEES

Originally, there were two statutory sections and one rule governing a party's right to obtain an award of attorney's fees from a rejection of an offer to settle: 1) section 768.79;[49] 2) section 45.061;[50] and 3) rule 1.442.[51]

The defendant who files an "offer of judgment" under section 45.061 which is not accepted within thirty days[52] may recover attorney's fees if the judgment is of no liability[53] or at least 25% less than the offer.[54] The

45. 640 So. 2d 120 (Fla. 5th Dist. Ct. App. 1994).

46. *Id.* at 121. The defendant, Sheriff Walter J. Gallagher, moved to dismiss the plaintiff's complaint, alleging they had failed to serve the Department of Insurance within 120 days after filing of the complaint, as required by § 768.28(6)(a) of the *Florida Statutes*. *Id.*

47. *Id.* at 121-22. The Fifth District Court of Appeal certified conflict with the First District Court of Appeal, which decided Austin v. Gaylord, 603 So. 2d 66 (Fla. 1st Dist. Ct. App. 1992).

48. *Turner*, 640 So. 2d at 121-22. The court concluded that merely serving someone with process does not make them a defendant, and even a strict application of the 120-day rule could not make it applicable to an entity that is not a "defendant." *Id.* at 123.

49. FLA. STAT. § 768.79 (1993), entitled "Offer of Judgment and Demand for Judgment."

50. FLA. STAT. § 45.061 (1993), entitled "Offers of Settlement."

51. FLA. R. CIV. P. 1.442. Rule 1442 was repealed in 1992, and parties are now directed to "comply with the procedure set forth in section 768.69 of the *Florida Statutes* (1991)." *Id.*; *see also* Timmons v. Combs, 608 So. 2d 1 (Fla. 1992) (adopting § 768.79 of the *Florida Statutes* as the rule).

52. *Cf.* Puleo v. Knealing, 654 So. 2d 148, 149-50 (Fla. 4th Dist. Ct. App. 1995) (applying the enlargement of time set forth for court-ordered mediation in § 44.102 of the *Florida Statutes*, but certifying the question in light of *Timmons* of whether § 44.102 represented an unconstitutional intrusion into the rule-making authority of the supreme court).

53. *Timmons*, 608 So. 2d at 1. In State Farm Mutual Automobile Insurance Co. v. Malmberg, 639 So. 2d 615 (Fla. 1994), the Malmbergs sued the defendant, State Farm, to

amount awarded is set off against the plaintiff's award.[55] If the fees and costs exceed the amount awarded to the plaintiff, the court will enter a judgment for the defendant less the amount of plaintiff's award.[56] Correspondingly, the plaintiff may receive attorney's fees if its "demand for judgment" under section 768.79 is not accepted within thirty days and it recovers at least 25% more than the demand.[57] A court may deny such an award if the offer was made in bad faith.

The two statutes differ in their application. A party may avail itself of section 768.79 of the *Florida Statutes* and secure an award of attorney's fees.[58] An award of attorney's fees under section 768.79 does not depend on the "reasonableness" of the rejection.[59] Once the requirements of section 768.79 have been met, the offering party can be denied attorney's fees only if the offer made was a "bad faith" offer.[60] The nature, validity, and enforceability of an offer are factors to consider when deciding whether the offer was made in good faith.[61]

Contrary to section 768.79, section 45.061 allows a party to collect attorney's fees after the court has made an express finding on the record that the rejection of the offer was unreasonable.[62] A defense verdict, under

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recover damages under their uninsured motorist coverage. *Id.* at 615. After the Malmbergs rejected State Farm's offer to settle, the case went to trial, and the jury returned a verdict for State Farm. *Id.* at 616. Although the court agreed with the district court's finding that the statutory presumption of unreasonable rejection is not conclusive, it found no support either in § 45.061 of the *Florida Statutes* or *Timmons* for the proposition that the presumption should not apply to defendants' verdicts. *Malmberg*, 639 So. 2d at 616. The court in *Malmberg* noted that § 768.79 grants defendants attorney's fees only on policies issued or renewed after October 1, 1990, thus finding it inapplicable to the Malmberg's 1987 accident. *Id. But see* Pickett v. Tequesta Dev. Co., 639 So. 2d 1133, 1134 (Fla. 5th Dist. Ct. App. 1994) (holding pre-amendment version of § 768.79, which applied to these plaintiffs, denied a defendant an award of fees where the judgment was of no liability).

54. *Malmberg*, 639 So. 2d at 616.

55. FLA. STAT. § 45.061 (1993).

56. *Id.*

57. *Id.*

58. *Accord* Baker Protective Servs. v. F.P. Inc., 659 So. 2d 1120 (Fla. 3d Dist. Ct. App. 1995).

59. FLA. STAT. § 768.79 (1993). The prerequisites of § 768.79 are a finding of no liability and a judgment obtained by the plaintiff that is at least 25% less than the defendant's offer of judgment. *Id.*

60. A court may not deny attorney's fees on the basis of the reasonableness of the rejection. Government Employee's Ins. Co. v. Thompson, 641 So. 2d 189, 190 (Fla. 2d Dist. Ct. App. 1994).

61. *Id.*

62. FLA. STAT. § 45.061 (1993).

section 45.061, creates a rebuttable presumption that the plaintiff must have unreasonably rejected the defendant's previous offer of judgment.[63] The presumption of an unreasonable rejection present in *Florida Statutes* section 45.061[64] applies even when there is a verdict for the plaintiff. The court's holding in *Malmberg*[65] makes clear that the unreasonable rejection presumption applies to defendants' verdicts as well as judgments for plaintiffs.[66]

A. *The "Res" Is History*

A defendant who prevails on a motion for summary judgment based on the doctrine of res judicata is entitled to attorney's fees pursuant to *Florida Statutes*. In *Olson v. Potter*,[67] the Second District Court of Appeal determined that the plaintiffs failed to plead any justiciable issue of law or fact because they attempted to litigate issues which had previously been determined by summary judgment.[68] The court thus awarded attorney's fees pursuant to section 57.105 of the *Florida Statutes*.[69]

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63. Henson v. Haslam, 644 So. 2d 1031, 1032 (Fla. 2d Dist. Ct. App. 1994). The court remanded for express findings that the plaintiff's rejection was "reasonable," thus rebutting the presumption that the rejection is unreasonable when there is a verdict for the defendant. *Id.*; *see also Malmberg*, 639 So. 2d at 616 (holding that the presumption of an unreasonable rejection, present in § 45.061, applies even when there is a verdict for the defendant).

64. FLA. STAT. § 45.061 (1993). Subsection (2) provides, in pertinent part:

> An offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least 25 percent greater than the offer rejected, and an offer shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least 25 percent less than the offer rejected.

Id.

65. *Malmberg*, 639 So. 2d at 616; *see also Timmons*, 608 So. 2d at 1.

66. Section 768.79 of the *Florida Statutes* which allows prevailing defendants to receive attorney's fees, applies only to policies issued *after* § 768.79 was amended on October 1, 1990. FLA. STAT. § 768.79 (1993).

67. 650 So. 2d 635 (Fla. 2d Dist. Ct. App. 1995).

68. *Id.* at 637.

69. *Id.* Section 57.105 allows the prevailing party to collect attorney's fees when no justiciable issue of either law or fact is raised by either the complaint or defense of the losing party. *Id.*; *cf.* Skubal v. Cooley, 650 So. 2d 169, 170 (Fla. 4th Dist. Ct. App. 1995) (holding that prevailing party entitled to fees under § 772.11 where plaintiff's claim lacked substantial factual or legal support). As a result, it is not necessary to find a "complete absence" of legal or factual support as provided in § 57.105. *Id.*

B. *Sometimes It's "Fees"able to Get a Table Even without a Reservation*

In *Amlan v. Detroit Diesel Corp.*[70] and *Wyatt v. State*,[71] the Fourth District Court of Appeal reiterated the rule that, where you can meet the "independent and collateral" test, you may proceed to recover on certain motions, even if a notice of appeal has been filed.[72] Determining that motions to assess fees and costs as a sanction for discovery violations is a collateral and independent claim, the Fourth District Court of Appeal reiterated that a trial court has continuing jurisdiction to entertain a post-trial motion once a notice of appeal is filed.[73] There may even be times where you can secure fees upon a motion made after judgment.[74]

C. *Operation Lodestar*

Agreeing with the Third[75] and Fourth[76] District Courts of Appeal, the Supreme Court of Florida, in *Searcy, Denney, Scarola, Barnhart & Shipley,*

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70. 651 So. 2d 701 (Fla. 4th Dist. Ct. App. 1995).

71. 652 So. 2d 453 (Fla. 4th Dist. Ct. App. 1995).

72. *Wyatt*, 652 So. 2d at 454; *Amlan*, 651 So. 2d at 706. This usually occurs in motions directed to recovery of attorney's fees. The court in *Amlan*, however, found the trial court correct in declining to consider the motion because the appeal dealt with the same discovery sanctions. *Amlan*, 651 So. 2d at 706.

73. *Wyatt*, 652 So. 2d at 454; *see also* Roberts v. Askew, 260 So. 2d 492 (Fla. 1972). In *Roberts*, the court held that "costs may be adjudicated after final judgment, after the expiration of the appeal period, during the pendency of an appeal, and even after the appeal has been concluded." *Roberts*, 260 So. 2d at 494. "However, the motion to tax costs should be made within a reasonable time after the appeal has been concluded." *Id.*; *see also* Finkelstein v. North Broward Hosp. Dist., 484 So. 2d 1241, 1243 (Fla. 1986) (finding that post-judgment motion for attorney's fees raises "collateral and independent claim" which a trial court has continuing jurisdiction to entertain within reasonable time, notwithstanding that litigation of main claim may have been concluded with finality).

74. Tampa Letter Carriers, Inc. v. Mack, 649 So. 2d 890, 891 (Fla. 2d Dist. Ct. App. 1995) (finding defendant's right to attorney's fees may not be "thwart[ed]" by plaintiff's voluntary dismissal of its case); *see also* Ganz v. HZJ, Inc., 605 So. 2d 871, 872-73 (Fla. 1992) (holding that rule announced in Stockman v. Downs, 573 So. 2d 835, 838 (Fla. 1991), that requires requests for contractual attorney fees, does not apply to § 57.105 of the *Florida Statutes*). The court in *Tampa Letter Carriers* extended the supreme court's holding by "conclud[ing] that the *Ganz* analysis applies to fee requests under section 768.79." *Tampa Letter Carriers*, 649 So. 2d at 891.

75. Stabinski, Funt & DeOliveira, P.A. v. Law Offices of Frank H. Alvarez, 490 So. 2d 159 (Fla. 3d Dist. Ct. App.), *review denied*, 500 So. 2d 545 (Fla. 1986).

76. Faro v. Romani, 629 So. 2d 872 (Fla. 4th Dist. Ct. App. 1993), *quashed on other grounds*, 641 So. 2d 69 (Fla. 1994).

P.A. v. Poletz,[77] held that the lodestar method for determining reasonable attorney's fees does *not* apply to a fee dispute between a discharged attorney and a former client, where the fee will be paid for by the client.[78] The supreme court in *Searcy* found the lodestar approach is "ill-suited for the task of assessing attorney's fees due as damages for breach of an agreement for the payment of fees because it does not allow for consideration of the 'totality of the circumstances surrounding the professional relationship.'"[79]

D. *Section 57.105 May Be "Teething"*

The Fourth District Court of Appeal, putting some bite in section 57.105 of the *Florida Statutes*, entered an order *sua sponte* directing the trial court to assess costs and fees pursuant to section 57.105. In doing so, the court in *Brahmbhatt v. Allstate Indemnity Co.*[80] reiterated the standard for determining a frivolous appeal:

> A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error, that its character may be determined without argument or research.[81]

E. *You Gotta Know What You Have to Know What You Can Do*

An order determining liability for attorney's fees is not an appealable non-final order unless it determines the *amount* of the fee. As the court noted in *Winkelman v. Toll*,[82] "[r]ule 9.130 (a)(3)(C)(iv), [of the *Florida Rules of Civil Procedure*] authorizes the appeal from non-final orders which determine 'the' issue of liability, not 'an' issue of liability."[83] Accordingly,

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77. 652 So. 2d 366 (Fla. 1995).

78. *Id.* at 368-69.

79. *Id.* (citing Rosenberg v. Levin, 409 So. 2d 1016, 1022 (Fla. 1982)).

80. 652 So. 2d 1224 (Fla. 4th Dist. Ct. App. 1995).

81. *Id.* at 1225 (citations omitted); *cf.* Olson v. Potter, 650 So. 2d 635, 637 (Fla. 2d Dist. Ct. App. 1995) (stating "trial court should have awarded [§ 57.105] attorney's fees to the appellees/cross-appellants since they prevailed on the motion for summary judgment on the doctrine of res judicata").

82. 632 So. 2d 130 (Fla. 4th Dist. Ct. App. 1994).

83. *Id.* at 131.

the Fourth District Court of Appeal recently dismissed the appeal of an order of entitlement to attorney's fees.[84]

In *Winkelman*, the appellant challenged a post-judgment order which had determined the appellee's entitlement to (but not the amount of) attorney's fees.[85] The appellate court found that it lacked jurisdiction to review an order as to the "entitlement" to attorney's fees when the amount had yet to be determined.[86] Indeed, even in cases where an appellant is completely justified in challenging "entitlement," jurisdiction will still not lie from that order (in the absence of a judicial determination of the amount).[87]

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84. Reliable Reprographics Blueprint & Supply, Inc. v. Florida Mango Office Park, Inc., 645 So. 2d 1040 (Fla. 4th Dist. Ct. App. 1994).

85. *Winkelman*, 632 So. 2d at 131. The court considered an order for entitlement to attorney's fees similar to a partial summary judgment, which was governed by rule 9.130(a)(3)(C)(iv), stating that the rule authorizes the appeal of non-final orders which determine "the" issue of liability, not "an" issue of liability. *Id.* at 131.

86. *Id.* The court explained that:

> Allowing appeals from such an order as this one would mean that any time a court enters an order determining a party is entitled to attorney's fees, costs, or some other type of relief which could be construed as "affirmative relief," it could generate two appeals, one from the order of entitlement, and a second from the order determining the amount, even before a final judgment, which could then produce a third appeal. Another reason why orders merely determining entitlement to attorney's fees should not be appealable is because consideration of entitlement and amount are frequently overlapping considerations which cannot be separated.

Id. at 132; *see also* Hunt v. Hunt, 648 So. 2d 764, 766 (Fla. 2d Dist. Ct. App. 1994); Trans Atl. Distrib., L.P. v. Whiland & Co., S.A., 646 So. 2d 752, 752 (Fla. 5th Dist. Ct. App. 1994) (appealing an order which determined entitlement to attorney's fees but not amount must be dismissed for lack of jurisdiction); First Oak Brook Corp. Syndicate, Inc. v. Swiss Beach Holdings, Inc., 644 So. 2d 1030, 1030 (Fla. 4th Dist. Ct. App. 1994); Gonzalez Eng'g, Inc., v. Miami Pump & Supply Co., 641 So. 2d 474, 474 (Fla. 3d Dist. Ct. App. 1994) (finding court was without jurisdiction to review post-final judgment order which determined appellant was entitled to attorney's fees but § 57.105 of the *Florida Statutes* did not fix amount.); Cooper v. Cooper, 641 So. 2d 198, 198 (Fla. 4th Dist. Ct. App. 1994).

87. *See* Noggle v. Turner Cattle Co., 656 So. 2d 619, 620 (Fla. 2d Dist. Ct. App. 1995); *see also* Hernando County v. Leisure Hills, Inc., 648 So. 2d 257, 258 (Fla. 5th Dist. Ct. App. 1994) (stating that until damage amount is assessed, no appeal may lie for judgment of liability); McIlveen v. McIlveen, 644 So. 2d 612, 612 (Fla. 2d Dist. Ct. App. 1994); *Trans Atl. Distrib., L.P.*, 646 So. 2d at 752; *Gonzalez Eng'g, Inc.*, 641 So. 2d at 474; Adlow, Inc. v. Mauda, Inc., 632 So. 2d 714, 714 (Fla. 5th Dist. Ct. App. 1994); Knight v. Mastrianni, 626 So. 2d 338, 338 (Fla. 4th Dist. Ct. App. 1993) ("We decline review of the order granting attorney's fees since it does not fix the amount of the fee awarded. Thus, the issue of attorney's fees is not ripe for appellate review."); Hobbs v. Hobbs, 518 So. 2d 439, 441 (Fla.

V. IMPACT OF THE *FABRE* DECISION

A. *All's "Wells" That Ends Well*

When interpreting the infamous footnote three in *Fabre v. Marin*,[88] our supreme court has determined that a non-settling defendant is not entitled to a setoff from non-economic damages based on the amount paid by the settling defendant.[89] The court reasoned that the set-off statutes were applicable to economic damages, and for purposes of calculating the non-settling defendant's obligation, the settlement proceeds were to be apportioned between economic and non-economic damages in the same proportion as the jury's award.[90] Arguing that the set-off statutes are only

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1st Dist. Ct. App. 1988); *cf. Reliable Reprographics*, 645 So. 2d at 1042 (distinguishing *Winkelman* on ground that order may be appealable where trial court denies motion for attorney's fees, since issue of attorney fees is completely resolved).

88. Fabre v. Marin, 623 So. 2d 1182, 1186 (Fla. 1993). There are a number of recently decided cases which apply or interpret *Fabre*. *See, e.g.*, Wells Fargo Guard Servs., Inc. v. Nash, 654 So. 2d 155, 156 (Fla. 1st Dist. Ct. App. 1995); Ashraf v. Smith, 647 So. 2d 892, 893 (Fla. 3d Dist. Ct. App. 1994) (holding hospital should have been included on verdict form), *review denied*, 658 So. 2d 989 (Fla. 1995); City of Homestead v. Martins, 645 So. 2d 187, 187 (Fla. 3d Dist. Ct. App. 1994) (concluding trial court erred in entering judgment against hospital for amount exceeding percentage of liability apportioned to it by jury); Schindler Elevator Corp. v. Viera, 644 So. 2d 563, 564 (Fla. 3d Dist. Ct. App. 1994) (holding that despite fact that county was not party to suit at trial, court should have instructed jury to apportion liability of county which owned building in which accident occurred even though county had settled with victim's estate); Owens-Illinois v. Baione, 642 So. 2d 3, 4 (Fla. 2d Dist. Ct. App.) (stating apportionment of fault is precluded where evidence is insufficient for jury to make accurate assessment of fault of other entities who manufactured asbestos products), *review denied*, 649 So. 2d 870 (Fla. 1994); BellSouth Human Resources Admin., Inc. v. Colatarci, 641 So. 2d 427, 428 (Fla. 4th Dist. Ct. App. 1994) (finding it was error to fail to include non-party tortfeasors on verdict form); East West Karate Ass'n, Inc. v. Riquelme, 638 So. 2d 604, 605 (Fla. 4th Dist. Ct. App. 1994) (holding trial court erred in not submitting name of karate student who administered kick which caused plaintiff's injury together with name of karate association on jury verdict form; despite fact that student was not party to suit, association was only required to pay non-economic damages in amount proportionate to percentage of fault); Graham v. Brown, No. 93-1110-CIV-T-17A, 1994 WL 456631, at *2 (M.D. Fla. Aug. 18, 1994) (holding fault can be apportioned to third party even where defendant has caused removal of third party from action).

89. Wells v. Tallahassee Memorial Regional Medical Ctr., Inc., 659 So. 2d 249 (Fla. 1995).

90. *Id.* at 252-53; *cf.* Hoch v. Allied-Signal, Inc., 29 Cal. Rptr. 2d 615 (Ct. App. 1994) (reasoning that to apply set-off provisions in situations of several liability would discourage rather than encourage settlement). The *Hoch* court stated if the settlement was "low," the plaintiff would receive less that the non-economic damages awarded by the jury. *Hoch*, 29

applicable where there is common liability, as in the case of economic damages, Wells asserted that the payment by one tortfeasor should only extinguish that tort feasor's liability and have no effect on another tortfeasor's liability.[91] Thus, Wells contended, where liability is determined by the jury as a percentage of fault, section 768.81(3) would apply and there would be no set-off.[92] Using the language in section 46.015, the court reasoned[93] that a defendant sued under section 768.81 may not be jointly liable with other defendants for non-economic damages.[94] In light of this determination, the court needed only to categorize the damages to ascertain the non-settling defendants' obligation.[95] As the court noted, "the settlement proceeds should be divided between economic and non-economic damages in the same proportion as the jury's award."[96]

Cal. Rptr. 2d at 617. If the settlement was "high," the non-settling defendant would reap the benefit, paying less than their fault-share of the non-economic damages. This would be inequitable and provide "little incentive for the injured person to settle with one or fewer and all of the tort feasors." *Id.*; *see also* McDermott, Inc. v. AmClyde, 114 S. Ct. 1461, 1467-70 (1994); Neil v. Kavena, 859 P.2d 203, 206 (Ariz. Ct. App. 1993) (no set-off of settlement amounts where liability of defendants is several rather than joint and several); Thomas v. Solberg, 442 N.W. 2d 73 (Iowa 1989); Wilson v. Gault, 668 P.2d 1104 (N.M. Ct. App.), *cert. denied*, 668 P.2d 308 (N.M. 1983). *But see* Curtis v. Canyon Highway Dist. No. 4, 831 P.2d 541 (Idaho 1992), *overruled on other grounds sub nom.* Laughten v. City of Pocatello, 886 P.2d 330 (Idaho 1994).

91. *Wells*, 659 So. 2d at 251.

92. *Id.*

93. The court distinguished Dionese v. City of West Palm Beach, 500 So. 2d 1347 (Fla. 1987), on the basis that the apportionment in question was among different causes of action and not between economic and non-economic damages. *Wells*, 659 So. 2d at 254.

94. *Wells*, 659 So. 2d at 253. The court reasoned the § 46.015 does not apply to non-economic damages. *Id.* The court also held that § 768.041 does not apply to non-economic damages. *Id.*

95. *Id.* The court also reasoned that a jury verdict as the basis for allocation would buffer possible collusion between settling parties as to the allocation of economic and non-economic damages. *Id.*

96. *Wells*, 659 So. 2d at 254. The concurrence is well taken. Justice Wells, joined by Justice Kogan, suggested that there are potential due process problems in having a jury apportion the liability of settling parties who are no longer parties to the judicial proceedings. *Id.* (Wells, J., concurring). These settling parties present no evidence, cross-examine no witnesses, and make no arguments. *Id.* It may be time to reexamine *Fabre* and *Allied-Signal* in light of the ponderable, substantive, and procedural problems which have become evident since these decisions were released. *Id.* It is also significant to note that similar statutes have been held unconstitutional. *See* Newville v. Department of Family Servs., 883 P.2d 793, 803 (Mont. 1994) (holding allocation of percentages of liability to non-parties violated substantive due process as to plaintiff).

B. *An Unsettling Experience*

A nonsettling defendant is not entitled to a credit against what it owes the plaintiff when another defendant settles for less than what that defendant would have owed. In *Dewitt Excavating, Inc. v. Walters*,[97] the Fifth District Court of Appeal held that it was a violation of section 768.81 to require the defendant to pay the first $25,000 and 25% of the remainder of the plaintiff's noneconomic damages.[98] The court also reiterated the statutory dictate that the doctrine of joint and several liability has no application where damages exceed $25,000.[99]

VI. DUTY

A. *Service with a Smile*

A retail establishment is not subject to liability under section 768.125 of the *Florida Statutes* when it sells alcohol in closed containers to an adult to be consumed off of the premises of the establishment.[100] In *Persen v. Southland Corp.*,[101] the Supreme Court of Florida reasoned that since the legislature used the words "knowingly serves," they must have intended that the habitual drunkard exception apply only to bars, taverns, or restaurants.[102] The court's construction of section 768.125 also appears consis-

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97. 642 So. 2d 833, 834 (Fla. 5th Dist. Ct. App. 1994).

98. *Id.* Section 768.81(5) of the *Florida Statutes* provides that "[n]otwithstanding the provisions of this section, the doctrine of joint and several liability applies to all actions in which the total amount of damages does not exceed $25,000." FLA. STAT. § 768.81(5) (1993).

99. *Dewitt*, 642 So. 2d at 834; *cf.* PAM Transp. v. Freightliner Corp., 57 F.3d 746, 747 (9th Cir. 1995) (holding Arizona statute which almost completely destroyed joint and several liability eliminated right of contribution where settling defendant's liability is "several only").

100. *See* FLA. STAT. § 768. 125 (1993). Section 768.125 entitled "[l]iability for injury or damage resulting from intoxication," provides:

> A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.

Id.

101. 656 So. 2d 453 (Fla. 1995).

102. *Id.* at 455. The court interpreted the legislative intent of the statutory language "knowingly *serves*" as referring to a habitual drunkard, rather than the statutory language

tent with the legislature's decision that there is a distinction between liability under 1) the habitual drunkard exception and 2) the criminal statute.[103] Through this holding, the Supreme Court of Florida appears to have extended much greater protection to retail establishments that sell alcoholic beverages to be consumed off of the premises.

B. *Don't Punish the Parents Unless They Did Something Too*

Rejecting that *Winn-Dixie v. Robinson*[104] imposed an alternative avenue of direct liability for punitive damages in the absence of fault, the court in *Schropp v. Crown Eurocars, Inc.*[105] stated that there are only two methods of imposing liability for punitive damages against a (parent) corporation: 1) The traditional *Mercury Motors*[106] additional fault requirement; and 2) direct liability (i.e. without the need to show additional fault) where the plaintiff can show the actions in question were committed by an "owner" or "managing agent" of the corporation.[107]

C. *Taking Another Bite out of Dog Owners*

Dog owners beware: The "independent contractor exception" to the "dangerous instrumentality doctrine" is not available to a dog owner as a

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"sells or furnishes," which refers to minors. *Id.*

103. *Id.* The criminal statute would extend liability to "[a]ny person who shall sell, give away, dispose of, exchange, or barter" any alcoholic beverage to a habitual drunkard. FLA. STAT. § 562.50 (1993).

104. 472 So. 2d 722 (Fla. 1985). Here, an assistant store manager expressly approved of the torts which had been committed against the plaintiff. *Id.* at 723. The acts of the store manager provided the jury with evidence of misconduct sufficient for direct liability under the managing-agent rule. *Id.*

105. 654 So. 2d 1158 (Fla. 1995). Plaintiff, Schropp, purchased a new Mercedes-Benz from the defendant, Crown Eurocars, Inc. Shortly thereafter, Schropp complained about spots on the finish of the car. After several unsuccessful attempts by Schropp to have the defect corrected, he finally left the car with the defendant for several days at the request of the sales manager. Again, Schropp was not satisfied with the defendant's attempts to remove the spots. This suit followed when the defendant refused to exchange Schropp's car for a new one. *Id.* at 1158-59.

106. Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981). Under the vicarious liability theory, a corporation can be held liable for punitive damages if the plaintiff establishes that the conduct of the employee was willful and wanton and establishes some additional fault on the part of the corporate employer. *Id.* at 549.

107. Bankers Multiple Life Ins. Co. v. Farish, 464 So. 2d 530 (Fla. 1985).

defense to an action brought pursuant to section 767.04[108] of the *Florida Statutes.*

In *Wipperfurth v. Huie*,[109] the defendant was boarding his canine with the plaintiff's employer.[110] The plaintiff was bitten by the dog while it was being boarded and he sued the defendant. The defendant alleged the kennel was liable while the kennel was watching the dog.[111] Relying on *Belcher Yacht, Inc. v. Stickney*,[112] the supreme court contrarily defined the term "owner" in section 767.04 as applying only to the dog's *actual* owner.[113] Thus, the court held that defendant remained liable while his dog was in the kennel.[114] The court's holding thus extends the duty of dog owners to kennel employees where they board their dogs.[115]

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108. Section 767.04 of the *Florida Statutes* provides:

> The owner of any dog that bites any person while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of the dog, is liable for damages suffered by persons bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness. However, any negligence on the part of the person bitten that is a proximate cause of the biting incident reduces the liability of the owner of the dog by the percentage that the bitten person's negligence contributed to the biting incident. A person is lawfully upon private property of such owner within the meaning of this act when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States, or when he is on such property upon invitation, expressed or implied, of the owner. However, the owner is not liable, except as to a person under the age of 6, or unless the damages are proximately caused by a negligent act or omission of the owner, if at the time of any such injury the owner had displayed in a prominent place on his premises a sign easily readable including the words "Bad Dog." The remedy provided by this section is in addition to and cumulative with any other remedy provided by statute or common law.

FLA. STAT. § 767.04 (1993).

109. 654 So. 2d 116 (Fla. 1995).

110. *Id.* at 116. The independent contractor exception to the doctrine is inapplicable because the dangerous instrumentality doctrine itself is inapplicable to an action brought pursuant to § 767.04 of the *Florida Statutes. Id.* at 117; *see also* Donner v. Arkwright-Boston Mfrs. Mut. Ins. Co., 358 So. 2d 21, 26 (Fla. 1978) (holding that jury should not have been instructed on assumption of risk, but only on defenses expressed in § 768.04).

111. *Wipperfurth*, 654 So. 2d at 116-17.

112. 450 So. 2d 1111 (Fla. 1984).

113. *Wipperfurth*, 654 So. 2d at 117.

114. *Id.*

115. *Id.*

D. *Physicians Are Warned about the Duty to Warn*

Doctor's take heed: Physicians may be held liable to third persons who are not their patients for failing to warn them of known dangers. In *Pate v. Threlkel*,[116] the plaintiff alleged that a doctor had a duty to warn the plaintiff's mother of the risks to her children of a genetically transmitted disease.

In *Pate*, the doctor's failure to warn prevented early detection of the plaintiff's (child's) cancer, significantly reducing her chances of successfully treating the disease.[117] In rejecting privity as necessary to establish liability between a patient's child and a health care provider,[118] the court reasoned that the prevailing standard of care may create a duty to certain identified third parties where the physician knows of the existence of those third parties.[119] The court noted that this duty to warn could be satisfied by warning the patient, whom it is presumed will inform the third parties.[120] The court through this holding joined the large number of jurisdictions that protect innocent third parties from harm by imposing a greater duty upon a doctor to persons other than his patients.[121]

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116. 20 Fla. L. Weekly S356 (July 20, 1995). The author claims a hollow victory in this court's rejection as to the application of Boynton v. Burglass, 590 So. 2d 446 (Fla. 3d Dist. Ct. App. 1991), as his argument was exactly what the supreme court adopted in *Pate*.

117. *Id.*

118. *Id.* at S358.

119. *Id.* "[L]ack of privity does not necessarily foreclose liability if a duty of care is otherwise established." *Id.* at S357 (quoting Baskerville-Donovan Eng'rs, Inc. v. Pensacola Exec. House Condominium Ass'n, 581 So. 2d 1301, 1303 (Fla. 1991)).

120. *Pate*, 20 Fla. L. Weekly at S358.

121. *See, e.g.*, White v. United States, 780 F.2d 97, 101-02 (D.C. Cir. 1986) (deciding that psychotherapist in certain circumstances bears a duty to exercise reasonable care to protect foreseeable victim from danger); Jablonski v. United States, 712 F.2d 391, 398 (9th Cir. 1983) (holding liability exists against psychotherapists for failure to warn where victim was foreseeable and identifiable); Reiser v. District of Columbia, 563 F.2d 462, 479 (D.C. Cir. 1977) (applying similar duty to warn to decision of paroling dangerous sex-offender), *modified on other grounds*, 580 F.2d 647 (D.C. Cir. 1978) (en banc); Hicks v. United States, 511 F.2d 407, 422 (D.C. Cir. 1975) (stating attack on wife by patient was foreseeable because it was closely related to reason he was receiving treatment); Brady v. Hopper, 570 F. Supp. 1333, 1339 (D. Colo. 1982) (stating that "specific threats to specific victims" states workable, reasonable, and fair boundary upon sphere of therapist's liability for acts of patients), *aff'd*, 751 F.2d 329 (10th Cir. 1984); Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 193 (D. Neb. 1980) (recognizing psychiatrist had duty to initiate whatever precautions were reasonably necessary to protect potential victims from violence when staff knew or should have known of patient's dangerous propensities); Williams v. United States, 450 F. Supp. 1040, 1046 (D.S.D. 1978) (recognizing liability of government for shooting death of

three persons one day after mental patient was released from V.A. Hospital); Smith v. United States, 437 F. Supp. 1004, 1010 (E.D. Pa. 1977) (holding psychotherapist liable for failure to predict dangerousness of patient), *rev'd on other grounds*, 587 F.2d 1013 (3d Cir. 1978); Greenberg v. Barbour, 322 F. Supp. 745, 747-48 (E.D. Pa. 1971) (explaining failure of physicians to admit homicidal patient can be negligent); Merchants Nat'l Bank & Trust Co. v. United States, 272 F. Supp. 409, 418-20 (D.N.D. 1967) (stating psychiatrist is liable for failure to predict dangerous propensities of patient); Hamman v. County of Maricopa, 775 P.2d 1122, 1128 (Ariz. 1989) (en banc) (psychiatrist in some circumstances owes duty to protect possible victim); Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 340 (Cal. 1976) (stating when therapist determines or should determine that patient poses serious risk of violence to another, therapist must use reasonable care to protect that person which may require duty to warn); Mero v. Sadoff, 37 Cal. Rptr. 769, 776 (Ct. App. 1995) (stating physician may be liable for examination even where there is no physician-patient relationship); Reisner v. Regents of the Univ. of Cal., 37 Cal. Rptr. 2d 518, 520 (Ct. App. 1995) (stating where defendant doctor negligently failed to tell 12-year-old girl, his surgical patient, or her family that she received AIDS-tainted blood and three years later, young woman innocently infected her boyfriend by their sexual relations, defendant's duty to warn extended to boyfriend notwithstanding that at time of AIDS-tainted transfusion boyfriend was unknown and unidentified third person); Myers v. Quesenberry, 193 Cal. Rptr. 733, 735 (Ct. App. 1983) (holding doctor's liability to extend to unknown but foreseeable third party when doctor failed to warn patient of risk of driving in her condition); Perreira v. State, 768 P.2d 1198, 1212 (Colo. 1989) (en banc) (explaining psychiatrist owes duty of care to make sure that patient does not pose a danger to third parties); Naidu v. Laird, 539 A.2d 1064, 1072 (Del. 1988) (upholding judgment against psychiatrist based on his failure to take reasonable steps to protect potential victim from violence resulting from release of committed patient who killed victim in auto accident while in psychotic state); Nova Univ. v. Wagner, 491 So. 2d 1116, 1118 (Fla. 1986) (deciding that child care institution that accepted emotionally disturbed children it knew or should have known had propensity to commit acts that might harm others owes duty to exercise reasonable care in its operation to avoid harm to general public); Life Ins. Co. of Ga. v. Lopez, 443 So. 2d 947, 948 (Fla. 1983) (holding seller of insurance has duty to investigate where it has actual knowledge of beneficiary's murderous intentions to its insured); Boynton v. Burglass, 590 So. 2d 446, 448 (Fla. 3d Dist. Ct. App. 1991) (stating exception to general rule that there is no duty to control conduct of another or to give warning to those placed in danger by that conduct arises where there is special relationship between defendant and person whose actions need to be controlled or person whose injury is foreseeable from failure to control conduct); Tucker v. Lavernia, 451 So. 2d 972, 973 (Fla. 4th Dist. Ct. App. 1984) (explaining whether harm inflicted by particular patient was actionable was question of fact precluding summary judgment); Hofmann v. Blackmon, 241 So. 2d 752, 753 (Fla. 4th Dist. Ct. App. 1970) (explaining physician has duty to warn if patient poses threat to third parties); Bradley v. Wessner, 287 S.E.2d 716, 721 (Ga. Ct. App.) (holding lack of privity between physician and ultimate victim not sufficient to eliminate duty to warn), *aff'd*, 296 S.E.2d 693 (Ga. 1982); Eckhardt v. Kirts, 534 N.E.2d 1339, 1344 (Ill. App. Ct. 1989) (deciding cause of action arises against psychiatrist for failure to warn); *In re* Votteler, 327 N.W.2d 759, 762 (Iowa 1982) (holding duty to warn exists where foreseeable victim does not know of danger); Freese v. Lemmon, 210 N.W.2d 576, 580 (Iowa 1973) (stating complaint that alleges physician knew of patient's danger but failed

to warn not dismissable for failure to state cause of action); Kansas State Bank & Trust Co. v. Specialized Transp. Servs., Inc., 819 P.2d 587, 604 (Kan. 1991) (finding no cause of action for failure to report); Durflinger v. Artiles, 673 P.2d 86, 94 (Kan. 1983) (recognizing cause of action against psychiatrist for negligence for failure to protect ultimate victims of patient, his mother and younger brother); Evans v. Morehead Clinic, 749 S.W.2d 696, 699 (Ky. Ct. App. 1988) (holding therapist owes duty of ordinary care to protect reasonably foreseeable victim of danger from assault by patient); Joy v. Eastern Maine Medical Ctr., 529 A.2d 1364, 1366 (Me. 1987) (recognizing it is jury question whether physician should have warned under particular set of circumstances); Furr v. Spring Grove State Hosp., 454 A.2d 414, 418 (Md. 1983) (following *Restatement*, stating duty applies if special relationship exists); Bardoni v. Kim, 390 N.W.2d 218, 226-27 (Mich. Ct. App. 1986) (explaining whether psychiatrist should have known patient was dangerous specifically to his brother was fact issue, precluding summary judgment); Welke v. Kuzilla, 375 N.W.2d 403, 406 (Mich. Ct. App. 1985) (holding doctor's injection given night before accident raised cause of action for third party victim); Lough v. Rolla Women's Clinic, Inc., 866 S.W.2d 851, 854-55 (Mo. 1993) (deciding where defendant clinic negligently failed to administer RhoGam to Rh-negative expectant mother, causing her to develop antibodies that attacked blood cells of her subsequently conceived Rh-positive child, clinic was liable for such preconception negligence to then unconceived and later born child); Fosgate v. Corona, 330 A.2d 355, 358 (N.J. 1974) (holding doctor liable to relatives of tubercular patient for negligently having failed to diagnose the disease that led to infection of relatives); McIntosh v. Milano, 403 A.2d 500, 508 (N.J. Super. Ct. Law Div. 1979) (deciding substantial fact issue as to whether psychiatrist owed duty to warn victim precluded summary judgment); Wilschinsky v. Medina, 775 P.2d 713, 717 (N.M. 1989) (holding physician owed duty to public after administering drugs to patient with known side effects that might impair patient's judgment); Homere v. State, 361 N.Y.S.2d 820, 824-25 (N.Y. Ct. Cl. 1974) (holding hospital liable in negligence for releasing patient who assaulted plaintiff), *aff'd*, 370 N.Y.2d 246 (N.Y. App. Div. 1975); Pangburn v. Saad, 326 S.E.2d 365, 367 (N.C. Ct. App. 1985) (holding complaint against psychiatrist stated claim for relief in negligence for patient who stabbed plaintiff's sister shortly after release); Leverett v. State, 399 N.E.2d 106, 109 (Ohio Ct. App. 1978) (explaining motions to dismiss are inappropriate in negligence claims involving physicians' duty to take precautionary measures); Wharton Trans. Corp. v. Bridges, 606 S.W.2d 521, 526-27 (Tenn. 1980) (holding physician liable for failure to take precautionary steps if his conduct falls below recognized standard of accepted professional practice in medical profession and specialty thereof, if any, that is prevailing in community in which he practiced); Gooden v. Tips, 651 S.W.2d 364, 369 (Tex. Ct. App. 1983) (explaining that under proper facts, physician can owe duty to use reasonable care to protect public); Peck v. Counseling Serv., 499 A.2d 422, 427 (Vt. 1985) (recognizing psychiatrist had duty to warn third party that patient was likely to cause property damage); Peterson v. State, 671 P.2d 230, 237 (Wash. 1983) (holding psychiatrist who diagnosed patient as "gravely disabled" had duty to take reasonable precautions to protect persons who might be endangered by the patient's dangerous propensities); Kaiser v. Suburban Transp. Sys., 398 P.2d 14, 16 (Wash. 1965) (holding where plaintiff's truck driver had accident injuring several people, and plaintiff-employer thereafter settled with victims and sought indemnity from doctor alleging doctor negligently failed to diagnose driver's disabilities and warn driver, it was expectable that if doctor negligently certified unfit person as qualified to drive commercial vehicle, any injury

VII. ECONOMIC LOSS DOCTRINE: YOU CAN'T ALWAYS WIN WITH THE ECONOMIC LOSS RULE

During the last year, the courts in Florida decided several cases[122] involving the application of the "economic loss rule."[123] The economic

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to third person from highway accident was well within range of apprehension), *modified*, 401 P.2d 350 (Wash. 1965); Schuster v. Altenburg, 424 N.W.2d 159, 162 (Wis. 1988) (recognizing complaint stated cause of action for relief based on psychiatrist's failure to take reasonable measures to protect from patient).

122. *See, e.g.*, Florida Bldg. Inspection Serv., Inc. v. Arnold Corp., 20 Fla. L. Weekly D1703, D1703 (3d Dist. Ct. App. July 26, 1995) (deciding to decline any further erosion of the economic loss doctrine); Greens of Town & Country Condominium Ass'n v. Greens of Tampa, Inc., 653 So. 2d 1136, 1137 (Fla. 2d Dist. Ct. App. 1995) (holding economic loss rule bars negligence claims where no additional personal injury or damages to any other property occurs); *see also* Palau Int'l Traders, Inc., v. Narcam Aircraft, Inc., 653 So. 2d 412, 416 (Fla. 3d Dist. Ct. App. 1995) (explaining economic loss doctrine precluded subsequent airplane purchaser from recovering from airplane inspector for economic losses arising out of negligence in failing to locate flaw in airplane, despite absence of privity of contract and no personal injury or property damage to property other than airplane); C.A. Oaks Constr. Co., Inc. v. Ajax Paving Indus. Inc., 652 So. 2d 914, 915 (Fla. 2d Dist. Ct. App. 1995) (stating dismissal of counter claim based on negligent performance of contract work was proper where economic loss rule bars tort recovery as between parties for purely economic losses); City of Tampa v. Thornton-Tomasetti, P.C., 646 So. 2d 279, 281-82 (Fla. 2d Dist. Ct. App. 1994) (recognizing economic loss doctrine precluded City's recovery in negligence claim from engineering consulting firm for City's economic losses flowing from construction of public building); *see also* Hoseline, Inc. v. USA Diversified Prods., Inc., 40 F.3d 1198, 1199-2000 (11th Cir. 1994) (holding economic loss doctrine barred manufacturer's recovery of damages against supplier for common law fraud and theft, where claims arose from breach of contractual duty, and manufacturer did not allege any physical or property damage; economic loss doctrine bars claims between parties who lack contractual privity; economic loss doctrine bars tort recovery for contract claims which involve no injury to person or property).

123. This rule prohibits plaintiffs from raising tort claims without evidence of personal injury or property damage for the sole purpose of recovering economic damages arising from a breach of contract. *See* Jones v. Childers, 18 F.3d 899, 904 (11th Cir. 1994). The two most commonly referred cases are Casa Clara Condominium Ass'n, Inc. v. Charlie Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993) and AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180 (Fla. 1987). In *Casa Clara*, homeowners sued a concrete supplier under a negligence theory for having provided defective concrete which caused damage to buildings it was used in. *Casa Clara*, 620 So. 2d at 1245. Because no damage to other property occurred and nothing more than economic losses were involved, the plaintiff had no tort claim against the concrete supplier. *Id.* at 1247-48. In *AFM Corp.*, the court held that AFM, which contracted with Southern Bell to have its name advertised in the yellow pages, could not maintain a tort claim solely for economic losses. *AFM Corp.*, 515 So. 2d at 180-81. The court concluded that without a showing of some conduct resulting in personal injury or

loss rule bars recovery even where there was "no alternative remedy" outside of the tort claims.[124] The court in *SFC Valve Corp. v. Wright Machine Corp.* reasoned that to recognize a "'no alternative remedy' exception" to the rule would "cut[ ] against the purpose[s] of the economic loss rule."[125] The court's holding strengthened the economic loss rule and demonstrated the court's preference for encouraging parties to negotiate for warranty protection or to take other steps, such as purchasing insurance, in order to protect their economic interests.[126]

The economic loss rule will not defeat the claims of a "foreseeable plaintiff" even if there is no contract between the parties. In *Southland Construction, Inc. v. Richeson Corp.*,[127] a general contractor, sued the defendant, an engineer, for negligence in failing to meet professional engineering standards in designing a wall.[128] Although there was no contract between the plaintiff and the defendant, the court permitted the tort action, finding that "Richeson, as an individual professional, owed Southland a duty to perform his professional duties in a professional, competent manner."[129]

The economic loss rule also does *not* apply to tort claims where a finished product causes damage to property other than itself.[130] The

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property damage, there could be no independent tort claim. *Id.* at 181-82.

124. SFC Valve Corp. v. Wright Mach. Corp., 883 F. Supp. 710, 715 (S.D. Fla. 1995). In *SFC Valve*, the defendant, Wright, sold valve stems to Southern Corporation pursuant to a contract between the parties. *Id.* at 712. The certifications provided by Wright to Southern, which were required by the contract, were falsified. When Southern filed for bankruptcy, the plaintiff, SFC Valve, purchased Southern's assets, including the contract with Wright. After SFC discovered the falsified certifications, it reopened Southern's bankruptcy case in order to determine any causes of action Southern may have had against Wright for the falsified certifications. The bankruptcy court auctioned off these causes of action as assets, which Wright acquired by being the highest bidder. *Id.* at 712-13.

125. *Id.* at 715. The purpose of the economic loss rule is to encourage parties to protect their economic losses by purchasing insurance or negotiating for warranty protection. *Id.*

126. In addition, the court relied on Hoseline, Inc. v. U.S.A. Diversified Prods., Inc., 40 F.3d 1198 (11th Cir. 1994), finding no distinguishing facts in *SFC Valve* to warrant a different result. *SFC Valve*, 883 F. Supp. at 716.

127. 642 So. 2d 5 (Fla. 5th Dist. Ct. App. 1994).

128. *Id.* at 8-9. Economic losses consist of disappointed economic expectations and include damages for inadequate value, cost of repair and replacement of a defective product, or consequential loss of profits. *Casa Clara*, 620 So. 2d at 1246.

129. *Southland*, 642 So. 2d at 8; *accord* A.R. Moyer, Inc. v. Graham, 285 So. 2d 397 (Fla. 1973). The holding of this case, which is limited to its facts, stated that a general contractor has a cause of action for the alleged negligent supervisory performance by an architect. *A.R. Moyer, Inc.*, 285 So. 2d at 402.

130. *Casa Clara*, 620 So. 2d at 1246.

Second District Court of Appeal, in *E.I. Du Pont de Numours & Co. v. Finks Farms, Inc.*,[131] permitted an action in tort because the defendant's fungicide caused damage to other property, the plaintiff's tomato crop.[132] In finding liability, the court distinguished this case from *Casa Clara*.[133] In addition, the court found that the product used here was not "ineffective," but rather "defective" because it damaged other property.[134] Equally significant, the Third District Court of Appeal has also recently ruled that the economic loss rule does not bar claims for fraud in the inducement.[135]

VIII. NEGLIGENCE

A. *You Still Need to Make an Impact for Success*

Two recent cases[136] illustrate the supreme court's reluctance to join the majority of jurisdictions that have abolished the "impact rule."[137] In *R.J. v. Humana of Florida Inc.*,[138] the plaintiff sought recovery for psychological injuries caused by a negligent diagnosis that the plaintiff was HIV positive.[139] The court rejected the plaintiff's claim and upheld the

131. 656 So. 2d 171 (Fla. 2d Dist. Ct. App. 1995).

132. *Id.* at 172. "The economic loss rule prohibits tort recovery when a product damages itself, causing economic loss, but does not cause personal injury or damage to any property other than itself." *Id.* at 172 (citing *Casa Clara*, 620 So. 2d at 1246).

133. *Id.* at 173. In *E.I. DuPont*, the fungicide as a finished product damaged plaintiff's "other property," namely his tomato crop. *Id.* at 172-73.

134. *E.I. DuPont*, 656 So. 2d at 173. The defendant's fungicide, purchased independently by the plaintiff, damaged the plaintiff's plants. *Id.* at 173. This holding was not precluded by the facts of King v. Hilton-Davis, 855 F.2d 1047 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), because the plaintiff did not purchase his plants with the fungicide already sprayed on them. *E.I. Dupont*, 656 So. 2d at 173. *Contra* Monsanto Agric. Prods. Co. v. Edenfield, 426 So. 2d 574 (Fla. 1st Dist. Ct. App. 1982).

135. *See* HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 20 Fla. L. Weekly D2086, D2086 (3d Dist. Ct. App. Sept. 13, 1995).

136. R.J. v. Humana of Fla. Inc., 652 So. 2d 360 (Fla. 1995); Gonzalez v. Metro. Dade County Public Health Trust, 651 So. 2d 673 (Fla. 1995); *cf.* City of Hollywood v. Karl, 643 So. 2d 34 (Fla. 1st Dist. Ct. App. 1994). *But see* K.A.C. v. Benson, 527 N.W.2d 553 (Minn. 1995).

137. Under the impact rule, before a plaintiff can recover damages for the negligent infliction of emotional distress, the distress suffered must flow from physical injuries the plaintiff sustained in an impact. *Gonzalez*, 651 So. 2d at 676; *see* Reynolds v. State Farm Mut. Auto. Ins. Co., 611 So. 2d 1294, 1296 (Fla. 4th Dist. Ct. App. 1992), *review denied*, 623 So. 2d 494 (Fla. 1993).

138. 652 So. 2d at 360.

139. *Id.* at 362.

validity of the impact rule.[140] In *Gonzalez*, the plaintiff sued the defendants for psychological injuries resulting from inaccurate statements that the plaintiff's child, who had died months earlier, had actually never been buried and remained in the refrigerator at the hospital morgue.[141] The Supreme Court of Florida found the claim uncognizable without willful or wanton misconduct or physical injury.[142] The court also refused to adopt section 868 of the *Restatement (Second) of Torts*.[143]

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140. *Cf. K.A.C.*, 527 N.W.2d at 553 (stating actual exposure to HIV must be alleged in order to establish claim for emotional distress resulting from fear of contracting AIDS).

141. *Gonzalez*, 651 So. 2d at 674.

142. *Id.* at 675.

143. *Id.* at 676. By holding this way, the court reaffirmed Donahoo v. Bess, 200 So. 541 (Fla. 1941), which held that absent physical injury, Florida law will not permit a suit for emotional distress caused by the negligent handling of a dead body, and refused to adopt § 868 of the *Restatement (Second) of Torts.* Under § 868 "one who intentionally, recklessly or negligently removes, withholds, mutilates, or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body." RESTATEMENT (SECOND) OF TORTS § 868 (1977).

The Impact Rule continues to be liberalized. *See* Zell v. Meek, 20 Fla. L. Weekly S515 (Fla. Oct. 5, 1995) (holding plaintiff who witnessed her father's death when his apartment was bombed stated claim for negligent infliction of emotional distress although plaintiff did not begin experiencing physical impairment until nine months after bombing).

It is time to abolish the impact rule in favor of a fair and equitable traditional pleading and proof system that requires the plaintiff seeking damages for mental and emotional harm to similarly plead and produce fact witnesses, expert testimony, or other relevant evidence for jury consideration. *Accord* Angrand v. Key, 657 So. 2d 1146 (Fla. 1995) (stating under certain circumstances, grief experts may testify).

The impact doctrine was first enunciated in England in 1888 in the case of Victorian Railway Commission v. Coultas 13 App. Cas. 222; *see also* Stewart v. Gilliam, 271 So. 2d 466 (Fla. 4th Dist. Ct. App. 1972). Significantly, it was quickly rejected in England but not until after having been accepted into our system of jurisprudence. *See* Dulieu v. White & Sons, 2 K.B. 669 (1901).

While the impact rule remained a thorn in the side of those parties who rightfully suffered from psychic injury (unfortunately or fortunately) unaccompanied by physical impact, recent decisions of our and other courts began to recognize the harsh inequity of the rule. In 1985, for example, the Supreme Court of Florida in Champion v. Gray, 478 So. 2d 17 (Fla. 1985), was faced with a claim by the estate of a mother who sought damages for psychic injury when she had a heart attack after seeing her daughter at the scene of the accident just after she was killed by a car driven by the defendant. *Id.* at 18. The court decided that now it was time to recognize:

> that the price of death or significant discernible physical injury, when caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person, is too great a harm to require direct physical contact before a cause of action

exists.

Id. at 18-19. Although not going as far as other jurisdictions which permitted recovery for psychic trauma alone, without either physical injury or a "zone of danger" fright, see, e.g., Molien v. Kaiser Foundation Hospital, 616 P.2d 813 (Cal. 1980), this court conceded that psychic injury should be cognizable in certain situations. *Champion*, 478 So. 2d at 18-19.

The litmus test of "impact" (or the arbitrary "zone of danger" exception) as a prerequisite to recovery for psychic trauma simply does not comport with reality and the present day medical advancements. The apparent arbitrary diminution in the "severity" or "value" of those claiming psychic injury (by not permitting such claims) is neither warranted nor justified. Society has come to recognize and accept the reality and often indelible severity of mental or emotional distress (psychic injury) and thus, now is the time for a positive change in the law, which will respond to our medical advancement and inure to the benefits of society as a whole.

Indeed, as well-regarded former Chief Judge Gerald Mager of the Fourth District similarly noted:

> The beauty of our judicial system is its flexibility in the pursuit of justice -- its adherence to precedent yet its ability to reevaluate the continued vibrancy of such precedent. It is certainly more forthright to review and reject an unsound principle than to resort to judicial exceptions in order to obviate the harshness of such principle.

Jones v. Hoffman, 272 So. 2d 529, 532 (Fla. 4th Dist. Ct. App. 1973), *rev'd on other grounds*, 280 So. 2d 431 (Fla. 1973).

It is a great and honorable function of the supreme court to modify the law with society's advancement and change. Quoting an earlier decision of the supreme court, Judge Mager also reminds us in *Jones* that "[t]he law is not static. It must keep pace with changes in our society, for the doctrine of stare decisis is not an iron mold which can never be changed." *Id.* (quoting Gates v. Foley, 247 So. 2d 40, 43 (Fla. 1971)).

Medical technology has advanced remarkably in detection and treatment of mental or emotional distress. Pharmaceutical companies are now making billions of dollars on tricyclic antidepressants, Mono-oxidase inhibitors, beta blockers, etc., all designed and (apparently effective in) detection and treatment of the admittedly debilitating condition associated with emotional and mental distress ("psychic injury").

Emotional or mental distress, whether accompanied by physical trauma, is real. Ironically, the emotional or mental "trauma" can be far more devastating and indelible than a physical injury from which an individual often recovers. We as a loving society cannot dispute that scars of the heart often run deeper and are more "permanent" than those of the skin. What we feel; our emotional state, often can weigh heavier than our body. We should not send a message that this harm to this truly innocent person only becomes real if there is some accompanying "impact." We, as a society, recognize the reality and severity of psychological injury and the need for treatment (and redress). Therefore, persons who claim justifiable psychological injury ought to have the right to present evidence to a jury.

Judge Mager's explanation in the Fourth District Court of Appeal's decision in *Jones* quite aptly responds to the three counter-arguments raised in support of the impact rule that were mentioned or discussed in our supreme court's previous decisions such as *Gilliam* and *Champion*: 1) the difficulty of proving causation between the damages and the alleged fright or traumatic event; 2) the fear of fraudulent or exaggerated claims; and 3) the possibility of

B. *A Step in the Right Direction for the Unborn Fetus*

While reluctantly admitting that the present law in Florida prohibits an action for the wrongful death of an unborn child,[144] the First District Court of Appeal in *Young v. St. Vincent's Medical Center, Inc.*,[145] urged the supreme court to join the majority of jurisdictions in recognizing such an action.[146] It remains to be seen if the supreme court will follow the district court's suggestion[147] that Florida law should change and conform with the majority of states which recognize a cause of action for the death of an unborn, but viable child.[148]

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opening the flood gates to litigation. *Jones*, 272 So. 2d at 530-33.

In light of the above, and the recognition that mental suffering is already an actionable damage in certain cases, the impact rule should be abolished. *See* Miami Herald Publishing Co. v. Brown, 66 So. 2d 679, 681 (Fla. 1953) (holding mental suffering constitutes recoverable damages in cases of negligent defamation); Carson v. Baskin, 20 So. 2d 243 (Fla. 1944) (regarding an invasion of privacy); *accord* RESTATEMENT (SECOND) OF TORTS §§ 569, 570, 652H, cmt. b (1977).

144. Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980); Stern v. Miller, 348 So. 2d 303 (Fla. 1977). Both cases stand for the proposition that actions for wrongful death when the child is "envetre sa nere" (in the womb of the mother) do not exist in Florida.

145. 653 So. 2d 499 (Fla. 1st Dist. Ct. App. 1995). The plaintiff, who had been pregnant with twins brought suit against the defendant "alleging negligent prenatal care and the resulting wrongful death of her unborn daughter." *Id.* at 500. A doctor, who was in training, tried to determine the maturity of the babies' lungs by withdrawing amniotic fluid, but instead withdrew blood. A test was not performed to determine if the fetus was still bleeding. As a result, one of the twins whose lungs were punctured was stillborn. A doctor entered a sworn statement that the stillborn child was viable. *Id.* at 499-500.

146. *Id.* at 500.

147. Although one shudders to think it possible, if there is no change in the law regarding wrongful death actions for unborn children, it would appear to become beneficial for a defendant to actively or through inaction cause the demise of an unborn child in order to escape personal liability.

148. *Jones*, 653 So. 2d at 503. The burden of proving viability, injury, and damages rests upon the claimant. Thirty-four state courts have judicially created a cause of action permitting the recovery for the death of a fetus which was viable but delivered stillborn. In three other states, the legislatures have created a statutory cause of action. Five states have not passed on the matter, and seven states, including Florida, still deny recovery. *See generally* Connor v. Monkem Co., 898 S.W.2d 89 (Mo. 1995) (holding parents can sue for wrongful death of nonviable fetus); T.A. Borowski, Jr., Comment, *No Liability for the Wrongful Death of Unborn Children—The Florida Legislature Refuses to Protect the Unborn*, 16 FLA. ST. U. L. REV. 835, 839 (1988); Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Children*, 84 A.L.R.3d 411, 422-25 (1978 & Supp. 1994).

C. *Can't Cross the Road with that Chicken*

An administrative decision of a professional's misconduct is not conclusive proof of negligence in a subsequent civil action.[149] In *Stogniew v. McQueen*,[150] the supreme court stated that the lack of mutuality[151] of obligation barred a party from using an administrative decision as conclusive proof of negligence.[152]

D. *He Who Has Gas Better Have Class*

In an exception to the general rule that one is not responsible for the unexpected criminal behavior of a third person, the Second District Court of Appeal in *Butala v. Automated Petroleum & Energy Co. Inc.*,[153] found that a retailer has a higher standard of care to protect a customer from a known ongoing attack.[154] The court found in favor of the plaintiff when a third party, known by the station employees to be in a "foul mood," while at the station to purchase gasoline, set the plaintiff customer on fire.[155] The court found that the self-service station owner had a duty to take reasonable steps to protect patrons from on-premises gasoline fires that could result from the unsupervised use of its pumps.[156] This holding may be a springboard to extend liability to other retailers who fail to take

149. Stogniew v. McQueen, 656 So. 2d 917 (Fla. 1995).

150. 656 So. 2d at 917.

151. The court was unwilling to follow the lead of certain other states and of the federal courts in abandoning the requirement of mutuality in the application of collateral estoppel. *Id.* at 919-20.

152. *Id.* In this case, the plaintiff sought counseling from the defendant, a licensed family therapist, and later filed a complaint with the Florida Department of Business & Professional Regulation ("DPR") alleging that the defendant violated § 491.009(2)(s) of the *Florida Statutes* by failing to meet the minimum standards of performance in his professional relationship with the plaintiff. The DPR found for the plaintiff. The plaintiff, who also filed a civil suit for negligence, then tried to assert collateral estoppel and requested the trial court to follow the DPR ruling. *Id.* at 918-19; *cf.* Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064, 1066 (Fla. 1995) (holding rule requiring that there be mutuality of parties in order for doctrine of collateral estoppel to apply has been abrogated by statute in context of civil theft claim).

153. 656 So. 2d 173 (Fla. 2d Dist. Ct. App. 1995).

154. *Id.* at 175.

155. *Id.* at 174.

156. *Id.* at 175.

reasonable steps to protect a customer from the dangerous use of instrumentalities by third persons on the premises.[157]

E. *The "Misuse" Absolute Defense is Absolutely Dead*

The Supreme Court of Florida, in *Standard Havens Products, Inc. v. Benitez*,[158] abolished the absolute defense of product misuse in product liability actions alleging negligence.[159] The Supreme Court of Florida concluded that "much like the earlier demise of the absolute defense of contributory negligence, product misuse merges into the defense of comparative negligence. Consequently, product misuse reduces a plaintiff's recovery in proportion to his or her comparative fault."[160]

F. *Department of Corrections May Get Away with Prisoners Getting Away*

Applying Florida law,[161] the Florida Department of Corrections has only a general duty to protect.[162] The First District Court of Appeal in *Department of Corrections v. McGhee*,[163] noted that it felt bound by its earlier decision of the issue in *Department of Corrections v. Vann*,[164]

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157. *Cf.* Hall v. Billy Jacks, Inc., 458 So. 2d 760 (Fla. 1984); Surat v. Nu-Med Pembroke, Inc., 632 So. 2d 1136 (Fla. 4th Dist. Ct. App. 1994); Faverty v. McDonald's Restaurants, Inc., 892 P.2d 703 (Or. Ct. App. 1995) (stating employer liable for third party's injuries caused by off-duty employee who had worked 17 hours and fell asleep at wheel while driving home).

158. 648 So. 2d 1192 (Fla. 1994).

159. *Id.* at 1192.

160. *Id.* at 1197; *see also* West v. Caterpillar Tractor Co., 336 So. 2d. 80 (Fla. 1976); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

161. Department of Corrections v. McGhee, 653 So. 2d 1091 (Fla. 1st Dist. Ct. App. 1995). The court applied the "significant relationships" or "center of gravity" test from § 145 of the *Restatement (Second) of Conflict of Laws*. *Id.* at 1092; *see also* Stallworth v. Hospitality Rentals, Inc., 515 So. 2d 413 (Fla. 1st Dist. Ct. App. 1987); *cf.* Department of Health & Rehabilitative Servs. v. B.J.M., 656 So. 2d 906, 917 (Fla. 1995) (stating department is not liable for negligent placement of child unless done in bad faith or with malicious purpose, or if placement occurs in manner that exhibits wanton and willful disregard of human rights, safety, or property).

162. *See* Department of Health & Rehabilitative Servs. v. Whaley, 574 So. 2d 100 (Fla. 1991).

163. 653 So. 2d 1091, 1091 (Fla. 1st Dist. Ct. App. 1995) (affirming trial court's ruling to apply Florida law where escaped prisoners fled from Florida to Mississippi and murdered Robert McGhee).

164. 650 So. 2d 658 (Fla. 1st Dist. Ct. App. 1995).

however it recertified the same question as in *Vann*.[165] The court also held that "[t]he determination of whether a state agency may be held liable for its conduct within the state of Florida is properly determined pursuant to Florida law."[166]

IX. INSURANCE

A. *It's No Longer "Fairly Debatable" That It Is "Fairly Debatable"*

The Supreme Court of Florida recently found that the "fairly debatable" standard is not applicable to the determination of bad faith.[167] The court also reasoned that the statute which provides as a penalty damages recoverable from an uninsured motorist insurer in a bad faith action includes the total amount of the claimant's damages, including the amount in excess of the policy limits, and is therefore not to be applied retroactively.[168]

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165. *McGhee*, 653 So. 2d at 1093. The certified question was:

WHETHER THE DEPARTMENT OF CORRECTIONS MAY BE HELD LIABLE AS A RESULT OF THE CRIMINAL ACTS OF AN ESCAPED PRISONER?

Id.

166. *Id.*

167. State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62 (Fla. 1995).

168. *Id.* at 61. The court itemized several other district courts that had rejected the fairly debatable standard in both first party unfair insurance trade practices and third party bad faith actions. *Id.* at 62. The case represents a significant step in giving insured's rights to recover for the unfair practices of insurers. The author also notes that the recent decision of Auto Owners Insurance Co. v. Conquest, 658 So. 2d 928 (Fla. 1995), which provides that the "any person" language in § 624.155 means "any person," not any insured, should "open the door" to a wide range of "bad faith" actions against insurers. It is also significant to note that in Puntervold v. Fortune Insurance Co., No.89-01819, *sua sponte dismissed on other grounds*, the author asserted the same "any person means any person" argument. *See* Appellants Initial Brief at 6-17 (No. 89-01819). While the Fourth District Court of Appeal appeared poised to issue an opinion similar to the result reached in *Conquest*, it was forced to dismiss without issuing an opinion on the substantive claim, due to a procedural trial defect. Indeed, while the section does contain the terms "insured" and "insurer," it also refers to "third party claimants," and "beneficiaries," as well as to "any person or persons" indicating that the legislature knew the difference between the terms, and used them intentionally. *See, e.g.*, Heredia v. Allstate Ins. Co., 358 So. 2d 1353 (Fla. 1978). Perhaps even more significantly, § 624.155(1)(a) of the *Florida Statutes* itemizes other statutory sections wherein the phrase "any person" *must* be read to include others than the first party insured. *See, e.g.*, FLA. STAT. § 626.9651(i)(2) (1987) ("any other person with any interest in the proceeds payable under such contract or policy"); *id.* § 626.9541(1)(x) ("refusal to insure . . . because of race, color, creed, marital status, sex or national origin . . ."); *id.* §

B. *Permanently Happy*

In *Auto Owners Ins. Co. v. Tompkins*,[169] the Supreme Court of Florida recently ruled that future economic damages may be recovered when such damages are established with reasonable certainty and without the need to show permanent injury.[170] Although permanent injury is not a prerequisite to the recovery of future economic damages, it is a significant factor in establishing reasonable certainty of future damages.[171]

626.9551 (all releases "[u]nreasonably disapprove the insurance policy . . ."); *id.* § 626.9705 (provision that "[n]o life or disability insurer shall refuse to . . . sell, or issue a life or disability insurance policy . . .").

169. 651 So. 2d 89 (Fla. 1995).

170. *Id.* at 90. The plaintiff, after being involved in an auto accident, settled with his tortfeasor's insurance company for $25,000, the liability limits of his policy. To recover the damages which exceeded the $25,000 limit, the plaintiff sued his own insurance carrier, Auto-Owners Insurance Company, for underinsured motorist benefits. At trial, the court denied the plaintiff's request for a jury instruction which would have allowed the jury to award future economic damages even where the jury failed to find that the plaintiff suffered permanent injuries. *Id.* The instructions given to the jury only permitted them to award future economic damages if permanent injury was found. *Id.* Since the jury did not find that the plaintiff suffered permanent injuries, they only awarded the plaintiff for past economic damages. *Id.* at 90. The plaintiff appealed and the Second District Court of Appeal reversed, finding that the lower court erred in requiring the jury to find permanent injury as a prerequisite to awarding future economic damages. *Tompkins*, 651 So. 2d at 90. The case arrived before the court based on a conflict between the Second District Court of Appeal's decision and the Fourth District Court of Appeal's ruling in Josephson v. Bowers, 595 So. 2d 1045, 1046 (Fla. 4th Dist. Ct. App. 1992) (holding that there must be "permanent injury before a defendant may be held liable for future loss of income and other future damages in a personal injury claim").

171. *Tompkins*, 651 So. 2d at 91. The impact of this decision was to clear up any confusion among the districts about what needs to be established before future economic damages can be awarded. This holding established the "reasonable certainty" test and thus clearly rejected any showing of permanent injury as a prerequisite for recovering future economic damages. *Id.* at 90-91.

C. *You Can't Give Away What You Don't Have*

Although certifying the question,[172] the First District Court of Appeal held that an estate may recover under both the liability and uninsured motorist coverage of a deceased driver's policy, even though the uninsured motorist coverage excluded the car from coverage.[173] Dianna Warren died from injuries sustained on May 5, 1990 while a passenger in an automobile involved in a single-vehicle accident.[174] The car owned by Edward Chancey was driven by his daughter, Celeste Chancey Bryant, who was also killed.[175] As personal representative, Mr. Warren instituted a wrongful death action and sought recovery for his wife's injuries on the theory that the injuries resulted from the wife's negligent operation and/or negligent maintenance of the automobile which was insured by Travelers under a policy Mr. Chancey had purchased from Phoenix.[176] The estate settled with the appellees for the liability coverage policy limits of $50,000, but reserved all claims for benefits under the uninsured motorist provisions of the policy.[177] On behalf of the estate, Mr. Warren then filed the present complaint for declaratory judgment seeking uninsured motorist benefits.[178] The trial court entered summary judgment in favor of appellees, finding that the estate could not recover under both the liability and uninsured motorists provisions of the same policy.[179] Because *Reid v. State Farm Fire & Casualty Co.*[180] and its progeny[181] did not consider the validity of the

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172. Warren v. Travelers Ins. Co., 650 So. 2d 1082 (Fla. 1st Dist. Ct. App.), *review granted*, 658 So. 2d 994 (Fla. 1995). The First District Court of Appeal certified the following question:

> MAY AN INJURED PERSON WHO IS ENTITLED TO RECOVER BODILY INJURY LIABILITY BENEFITS, BUT WHOSE DAMAGES EXCEED THE POLICY LIMIT FOR LIABILITY COVERAGE, ALSO RECOVER UNDER THE SAME POLICY FOR UNINSURED MOTORIST BENEFITS, WHERE THE POLICY EXCLUDES THE INSURED VEHICLE FROM ITS DEFINITION OF "UNINSURED VEHICLE"?

Id. at 1084.

173. *Id.* Travelers argued that because of an exclusion in the policy, the automobile involved in the accident was not "uninsured." *Id.* at 1083. As a result, the trial court refused to allow the estate of Dianna Warren to recover under both the liability and uninsured motorist provisions of the same policy. *Id.*

174. *Warren*, 650 So. 2d at 1082-83.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Warren*, 650 So. 2d at 1083.

180. 352 So. 2d 1172 (Fla. 1977).

"your car" exclusion, the court in distinguishing the two cases, reasoned that "[e]xclusions to [uninsured motorist] coverage are not enforceable if the injured person is covered by the [bodily injury liability] provisions of the policy."[182]

D. *Peek-a-boo, We Can See You!*

An uninsured or underinsured motorist carrier who has been lawfully sued and properly joined as a party in a lawsuit should be disclosed to the jury in its actual status as a party defendant. In *Krawzak v. Government Employees Insurance Co.* ("GEICO"),[183] GEICO was the real party in interest, being both the liability insurer and underinsured motorist carrier.[184] In requiring disclosure, the court reasoned that "[i]f there had been a settlement with the tortfeasor, there would be no question that GEICO would have been the only party before the jury."[185] In stating that "GEICO could not have been made invisible or disguised in the courtroom" as merely "the tortfeasor's co-counsel," the court reasoned:

> An uninsured or underinsured motorist carrier should not be able to hide its true identity by being severed from the lawsuit while retaining its influence over the conduct of the lawsuit as co-counsel for the tortfeasor. In this case, this procedure seems inherently unfair to the plaintiff, deceptive to the jury, contrary to the insurance contract entered into between the plaintiff and its insurer, and contrary to statute.[186]

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181. *See, e.g.*, Smith v. Valley Forge Ins. Co., 591 So. 2d 926 (Fla. 1992); Brixius v. Allstate Ins. Co., 589 So. 2d 236 (Fla. 1991).

182. *Warren*, 650 So. 2d at 1083; *see also* Travelers Ins. Co. v. Chandler, 569 So. 2d 1337, 1339 (Fla. 1st Dist. Ct. App. 1990) (citing Mullis v. State Farm Mut. Auto. Ins. Co., 253 So. 2d 229, 233-34 (Fla. 1971)); *cf.* World Wide Underwriters Ins. Co. v. Welker, 640 So. 2d 46, 50 (Fla. 1994) (holding driver who was generally insured under mother's policy as "resident relative" could not collect uninsured motorist benefits from mother's insurer where driver had accepted financial responsibility for vehicle by obtaining his own liability coverage, but had expressly rejected uninsured motorist coverage when he was operating his vehicle).

183. 660 So. 2d 306 (Fla. 4th Dist. Ct. App. 1995).

184. *Id.* at 307.

185. *Id.* at 309.

186. *Id.* The court rejected the analysis set forth in Colford v. Braun Cadillac, Inc., 620 So. 2d 780 (Fla. 5th Dist. Ct. App.), *review denied*, 626 So. 2d 1367 (Fla. 1993).

E. *If You Choose to Jump in the Water, Expect to Get Wet*

If an insurer assumes the defense of an action where it could have denied coverage and the insured can demonstrate that the assumption of the defense resulted in prejudice to the insured, the insurer is estopped from subsequently raising the defense of non-coverage. In *Doe v. Allstate Insurance Co.*,[187] the supreme court reasoned that once an insurer begins to fulfill its promissory obligation to defend an insured by hiring counsel, conducting a pre-trial investigation, and controlling the insured's defense, a fiduciary duty arises which requires the exercise of good faith.[188]

X. OTHER INTERESTING DEVELOPMENTS

A. *Buckling Down on the Buckle Up Defense*

The seat belt defense cannot be submitted to a jury, unless the plaintiff presents "competent evidence"[189] that the failure to wear the seat belt caused or substantially contributed to the injuries. The plaintiff in *Zurline v. Levesque*,[190] sued the driver of the car in which she was a passenger.[191] Even though she was not wearing a seat belt, the court prohibited the defendant from informing the jury of that fact because there was no proof of causation.[192]

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187. 653 So. 2d 371 (Fla. 1995).

188. *Id.* at 373-74. *See* cases cited *infra* note 226 for other cases on the emergence and application upon the implied covenant of good faith.

189. *See* Burns v. Smith, 476 So. 2d 278 (Fla. 2d Dist. Ct. App. 1985); *see also* State Farm Mut. Auto. Ins. Co. v. Smith, 565 So. 2d 751 (Fla. 5th Dist. Ct. App.), *dismissed*, 570 So. 2d 1306 (Fla. 1990).

190. 642 So. 2d 1169 (Fla. 4th Dist. Ct. App. 1994).

191. *Id.*

192. *Id.* at 1170. The court used the *Pasarkanis* test from Insurance Co. of N. Am. v. Pasarkanis, 451 So. 2d 447 (Fla. 1984), which states that before a jury can consider the seat belt defense, the defendant must plead and prove the following: 1) the plaintiff failed to use "an available and fully operational seat belt;" 2) the nonuse was reasonable under the circumstances; and 3) the plaintiff's failure to use the seat belt caused or contributed substantially to his or her damages. *Id.* at 454. The court found that the defendant met the first two elements (as interpreted in Bulldog Leasing Co. v. Curtis, 630 So. 2d 1060 (Fla.), *cert. denied*, 115 S. Ct. 141 (1994)), but failed to meet the third requirement. *Zurline*, 642 So. 2d at 1170.

B. *Bulldog Remains the Big Dog on the Block*

The standard set by the Supreme Court of Florida in *Bulldog Leasing Co. v. Curtis*[193] applies in *all* cases where the defendant asserts the seat belt defense, and *not* only in cases where the plaintiff has possession or control of the vehicle.[194] The Second District Court of Appeal in *Osgood Industries Inc. v. Schlau*[195] applied the *Bulldog* test in its determination that the trial court erred in granting its motion for directed verdict as to the defendant's seat belt defense.[196]

C. *It's Not What You Say, It's Where You Say It*

Absolute immunity is afforded to any act which occurs during the course of judicial proceedings, including the tortious interference with a business relationship, so long as the act has some relation to the proceeding.[197] Answering a question certified from the Eleventh Circuit, the Supreme Court of Florida in *Levin, Middlebrooks, Mabie, Thomas, Mayers & Mitchell, P.A. v. United States Fire Insurance Co.*[198] extended the well-established rule of absolute immunity, which traditionally applied only to acts of slander, libel, perjury,[199] and other tort claims.[200] In so holding,

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193. 630 So. 2d 1060 (Fla.), *cert. denied*, 115 S. Ct. 141 (1994).

194. Osgood Indus. Inc. v. Schlau, 654 So. 2d 959, 961 (Fla. 2d Dist. Ct. App. 1995); *see also* Safety Kleen Corp. v. Ridley, 20 Fla. L. Weekly D842, D842 (1st Dist. Ct. App. Apr. 6, 1995) (jury must be instructed that violation of § 316.614 constitutes evidence of negligence).

195. 654 So. 2d at 959.

196. *Id.* at 961.

197. Levin, Middlebrooks, Mabie, Thomas, Mayers & Mitchell, P.A. v. United States Fire Ins. Co., 639 So. 2d 606, 607 (Fla. 1994). The certified question which brought this case to the court was:

> WHETHER CERTIFYING TO A TRIAL COURT AN INTENT TO CALL OPPOSING COUNSEL AS A WITNESS AT TRIAL IN ORDER TO OBTAIN COUNSEL'S DISQUALIFICATION, AND LATER FAILING TO SUBPOENA AND CALL COUNSEL AS A WITNESS AT TRIAL, IS AN ACTION THAT IS ABSOLUTELY IMMUNE FROM A CLAIM OF TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP BY VIRTUE OF FLORIDA'S LITIGATION PRIVILEGE.

Id.

198. *Id.* at 606.

199. This absolute immunity has its roots in several cases. *See* Fridovich v. Fridovich, 598 So. 2d 65, 66 (Fla. 1992) (quoting in part *Levin*, 639 So. 2d at 607) (holding defamatory statements made in course of judicial proceedings are absolutely privileged, "no matter how false or malicious the statements may be, so long as the statements are relevant to the subject of inquiry"); *see also* Cox v. Klein, 546 So. 2d 120, 122 (Fla. 1st Dist. Ct. App. 1989)

the Supreme Court of Florida appears to have greatly extended the scope of this immunity, again leaving the "[r]emedies for perjury, slander, and the like committed during judicial proceedings . . . to the discipline of the courts, the bar association, and the state."[201]

D. *If You Sell It, Will They Come?*

The mere hope of a plaintiff that some of its past customers may again choose to buy from them cannot be a basis for a tortious interference claim. The Supreme Court of Florida, in answering a certified question[202] in

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(holding immunity afforded to statements made during course of judicial proceeding extends not only to parties in proceeding but to judges, witnesses, and counsel as well); Wright v. Yurko, 446 So. 2d 1162, 1164 (Fla. 5th Dist. Ct. App. 1984) (holding torts of perjury, libel, slander, defamation, and similar proceedings that are based on statements made in connection with judicial proceeding are not actionable); Sussman v. Damian, 355 So. 2d 809, 811 (Fla. 3d Dist. Ct. App. 1977) (finding participants in judicial proceedings must be free from fear of later civil liability as to anything said or written during litigation so as not to chill actions of participants in immediate claim).

200. *Levin*, 639 So. 2d at 608. In the bad faith action, it was revealed that an attorney with the plaintiff firm was one of the people who had knowledge of the defendant's alleged bad faith. *Id.* at 607. The trial court granted the defendant's motion to disqualify the plaintiff firm in which the defendant certified that it would be calling an attorney from that firm as a witness at trial. *Id.* The defendant never called or subpoenaed that attorney at trial, and never notified the court that it would not be calling that attorney. *Id.* After the trial, the plaintiff firm sued the defendant for tortious interference with a business relationship, alleging that the defendant intentionally disqualified the attorney to prevent the plaintiff's firm from representing their client. *Id.* The defendant moved to dismiss on the grounds that its actions were protected by the absolute immunity afforded to statements or actions taken during a judicial proceeding. *Levin*, 639 So. 2d at 607. The supreme court upheld the dismissal. *Id.*; *see also* Ponzoli & Wassenberg, P.A. v. Zuckerman, 545 So. 2d 309, 310 (Fla. 3d Dist. Ct. App.) (holding tortious claim of extortion, which was based on alleged fraud and delaying tactics of counsel in course of litigation, was improper because conduct at issue was committed during course of judicial proceeding and was immune from civil liability in any subsequent proceeding), *review denied*, 554 So. 2d 1170 (Fla. 1989); Sailboat Key, Inc. v. Gardner, 378 So. 2d 47, 49 (Fla. 3d Dist. Ct. App. 1979) ("injurious falsehood, which is a tort that never has been greatly favored by the law, is subject to all the privileges recognized both in cases of personal defamation and in those of other types of interference with economic advantage") (quoting WILLIAM L. PROSSER, LAW OF TORTS § 114 (4th ed. 1971)).

201. *Levin*, 639 So. 2d at 608 (quoting *Wright*, 446 So. 2d at 1164).

202. The certified question before the supreme court was:

> Under Florida law, in a tortious interference with business relationships tort action, may a plaintiff recover damages for the loss of goodwill based upon future sales to past customers with whom the plaintiff has no understanding that they will continue to do business with the plaintiff, or is the plaintiff's recovery

Georgetown Manor, Inc. v. Ethan Allen, Inc.,[203] held that a plaintiff may not recover damages for the tortious interference with a business relationship, where the relationship is based on speculation regarding future sales to past customers.[204] The court distinguished *Insurance Field Services, Inc. v. White & White Inspection & Audit Services, Inc.*,[205] because the ongoing relationship that the tortfeasor interfered with there was "far different" than in *Georgetown*, where there was a retail furniture dealer with 89,000 past customers.[206] The court thus held that, while Georgetown could recover damages reasonably flowing from its existing relationships, it could not recover for tortious interference based on a speculative contention that past customers would return to purchase furniture.[207]

E. *If You're Finished, You May Be Done*

Voluntary dismissal of an active tortfeasor with prejudice entered by the agreement of parties pursuant to a settlement agreement is not the equivalent of an adjudication on the merits[208] that will serve as a bar to

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of damages limited to harm done to existing business relationships pursuant to which plaintiff has legal rights . . . ?

Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So. 2d 812, 813 (Fla. 1994).

203. 47 F.3d 1099 (11th Cir. 1995).

204. *Id.* at 1101.

205. 384 So. 2d 303, 305 (Fla. 5th Dist. Ct. App. 1980) (company had regularly been performing underwriting inspections, premiums, audits, and loss control work for 16 insurance company clients).

206. *Georgetown*, 47 F.3d at 1100 n.1. The case from which this question arose centers around a dissolution of a business relationship between a manufacturer and its former dealer. *See* Georgetown Manor Inc. v. Ethan Allen Inc., 991 F.2d 1533, 1535 (11th Cir. 1993). During the dissolution of their relationship, the manufacturer placed an ad in a newspaper which was the basis of the tortious interference claim. The advertisement announced the split between the parties and related that manufacturer had discontinued distributing to dealer, because dealer was not current on its debts. The ad also stated that manufacturer was opening new outlets and asked those customers who had unfilled orders with dealer to contact the new outlets where their orders would be filled expeditiously. The dealer then brought suit claiming that the ad interfered with its prospective relationship with former customers who had shopped with them in the past and might shop with them again in the future. *Id.* at 1535-36.

207. *Georgetown*, 47 F.3d at 1101. As a general rule, an action for the tortious interference with a business relationship requires a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if there had not been interference. *Id.*

208. JFK Medical Ctr., Inc. v. Price, 647 So. 2d 833, 834 (Fla. 1994). In *JFK*, the plaintiff sued her doctor (active tortfeasor) for medical malpractice. The suit included a claim against his employer, JFK Medical Center. The plaintiff agreed to dismiss her suit

continued litigation against the passive tortfeasor.[209] The Supreme Court of Florida in *JFK Medical Center, Inc. v. Price* also held that the voluntary dismissal of the active tortfeasor would not affect the passive tortfeasor's right to indemnification, reasoning that "[i]t would be unconscionable to require a passive tortfeasor to compensate an injured party, while at the same time barring indemnification from the active party."[210]

F. *An Interest(ing) Prejudgment Development*

A successful personal injury claimant is entitled to prejudgment interest on the claim from the time of the jury verdict to the entry of the final judgment.[211] In *Palm Beach County School Board v. Montgomery*,[212] some six months after entry of the verdict, the trial court decided post trial motions and entered a final judgment.[213] The school board contested the award of interest from the date of the verdict that was entered by the trial court rather than from the date of the final judgment.[214] The court applied the analysis as set forth in the seminal case of *Argonaut Insurance Co. v. May Plumbing Co.*[215] in awarding prejudgment interest on a personal injury claim from the date of the rendition of the jury verdict up to the time

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(with prejudice) against the doctor, but "the claim against the Center would not be affected." *Id.* at 833. The trial court granted JFK'S motion for summary judgment on the grounds that the dismissal of the physician operated as an adjudication on the merits. *Id.* at 833-34. The district court reversed and JFK asked the supreme court to quash the lower court's decision. *Id.* at 834.

209. *Id.*

210. *JFK Medical Ctr.*, 647 So. 2d at 834.

211. Palm Beach County Sch. Bd. v. Montgomery, 641 So. 2d 183, 184 (Fla. 4th Dist. Ct. App. 1994).

212. 641 So. 2d at 183.

213. *Id.* at 184.

214. *Id.*

215. 474 So. 2d 212 (Fla. 1985). In *Argonaut*, the court established the following principles:

1) An unliquidated claim becomes liquidated and susceptible of bearing prejudgment interest when a jury verdict has the affect of fixing the amount of damages;

2) Once a verdict has liquidated damages as of a certain date, computation of prejudgment interest is merely a ministerial mathematical computation to be performed by the court; and

3) Prejudgment interest is calculated at the same rate as postjudgment interest. *Palm Beach County Sch. Bd.*, 641 So. 2d at 184 (referring to *Argonaut*, 470 So. 2d at 215); *see also* Sullivan v. McMillan, 19 So. 340, 342-43 (Fla. 1896) (holding person injured should receive interest from time verdict liquidates damage claim).

of entry of the final judgment. The court distinguished *Zorn v. Britton*[216] which held that prejudgment interest would not be recoverable for personal injuries, on the basis that the case was limited to "unliquidated damages for personal injuries."[217]

G. *Even an Attorney's Magic Won't Make 10 Equal 100*

Under Florida's Wrongful Death Act,[218] a defendant cannot be required to pay 100% of the damages where one of the parents of the deceased child has been held to bear the majority of the fault.[219] Defendants can seek contribution despite the operation of the statute.[220] In *Hudson v. Moss*,[221] the Third District Court of Appeal reasoned that the policy underlying parent/child tort immunity disappears entirely in the unfortunate case where the child has died and the parent is suing for their own damages as a survivor,[222] and found that requiring a third party

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216. 162 So. 879 (Fla. 1935).

217. *Palm Beach County Sch. Bd.*, 641 So. 2d at 184 (quoting *Zorn*, 162 So. at 881).

218. FLA. STAT. § 768.20 (1993) ("A defense that would bar or reduce a survivor's recovery if he were the plaintiff may be asserted against him, but shall not affect the recovery of any other survivor").

219. Hudson v. Moss, 653 So. 2d 1071, 1073 (Fla. 3d Dist. Ct. App. 1995). This issue arose out of a wrongful death claim by the parents of a child drowning victim against the owners of the swimming pool where the child drowned. *Id.* at 1072. The trial court held the father to be 90% at fault for the child's drowning and held Larry and Sharon Hudson each five percent at fault. *Id.* at 1072. The trial court allowed full recovery to the mother by not reducing that amount by the percent of negligence attributed to the father. *Id.* The trial court held that this result was clearly mandated based upon the interplay of the Comparative Fault Act and the Wrongful Death Act of §§ 768.20, 768.71, and 768.81 of the *Florida Statutes*. *Id.*

220. *Hudson*, 653 So. 2d at 1073. The appellate court found error in the trial court's application of Joseph v. Quest, 414 So. 2d 1063, 1065 (Fla. 1982), which held that a contribution claim for a child's damages against a negligent parent is allowed only to the extent of the parent's liability insurance. *Hudson*, 653 So. 2d at 1073. Instead, the court found that the reasoning of Shor v. Paoli, 353 So. 2d 825 (Fla. 1977), was applicable to this case. *Hudson*, 653 So. 2d at 1073. The court did agree with the extension of the *Joseph* case that was adopted by the Fourth District Court of Appeal in Johnson v. School Board, 537 So. 2d 685, 685-86 (Fla. 4th Dist. Ct. App. 1989), which held that parent/child immunity was not applicable to a contribution claim where the child was deceased and the parents were suing for their own damages as survivors. *Hudson*, 653 So. 2d at 1073.

221. 653 So. 2d at 1071.

222. *Id.* (holding parent/child liability will deter parent from bringing action for damages on behalf of injured child).

tortfeasor to bear more than their proportionate share of liability unfairly denied them their right to contribution.[223]

H. *Doctors Medicate Hospital*

In a case which could "open the door" to other similar avenues of relief, the Supreme Court of Pennsylvania has held that doctors could sue a hospital for damages that resulted from poor peer reviews.[224]

I. *Expressing the Implied Covenant*

The implied covenant of good faith and fair dealing is gaining recognition as a weapon against bad faith conduct by organizations which are often in a superior bargaining position.[225]

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223. *Id.*

224. Cooper v. Delaware Valley Medical Ctr., 654 A.2d 547, 551 (Pa. 1995).

225. This has been especially apparent in the franchise arena. With franchise litigation on the rise, it is extremely important that both franchisors and franchisees (and their counsel) be aware of the emerging theories based on the requirement of good faith and fair dealing in contract performance.

One begins with the sentinel discussion as set out in Scheck v. Burger King Corp., 756 F. Supp. 543, 548-49 (S.D. Fla. 1991):

> It is axiomatic that a contract includes not only its written provisions, but also the terms and matters which, though not actually expressed, are implied by law, and these are as binding as the terms which are actually written or spoken. *Sharp v. Williams*, 141 Fla. 1, 192 So. 476, 480 (1939). One such implied term of a contract, recognized by Florida law, is the implied covenant of good faith and fair dealing. *Fernandez v. Vazquez*, 397 So. 2d 1171, 1174 (Fla. App. 1981) ("One established contract principle is that a party's good faith cooperation is an implied condition precedent to performance of a contract"); *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985) (seller of property has duty to disclose material defects of which she is aware in accord with principles of fair dealing and good faith).

Id. at 548-49; *see also* Burger King Corp. v. Weaver, 798 F. Supp. 684 (S.D. Fla. 1992).

As the court similarly stated in Idaho First Nat'l Bank v. Bliss Valley Foods, Inc., 824 P.2d 841, 862 (Idaho 1992), in reiterating a particular jury instruction:

> Every contract imposes on all partes to the contract an obligation of good faith and fair dealing in its performance or enforcement. "Good faith" means honesty in fact in the conduct or the transaction concerned. Each party owes a duty to exercise good faith in its dealing and transactions with the other party. If a party fails to deal honestly with the other party, it is liable for a breach of the duty of good faith.

Id.; *see also* First Nationwide Bank v. Florida Software Servs., Inc., 770 F. Supp. 1537, 1542 (M.D. Fla. 1991) (under Florida law, a party's good faith cooperation is an implied condition precedent).

This fundamental concept of good faith and fair dealing was also articulated by renowned contract specialist Corbin:

> If the purpose of contract law is to enforce the reasonable expectations of parties induced by promises, then at some point it becomes necessary for courts to look to the substance rather than the form of the agreement, and to hold that substance controls over form. What courts are doing here, whether calling the process "implication" of promises, or interpreting the requirements of "good faith", as the current fashion may be, is but a recognition that the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations. When the court "implies a promise" or holds that "good faith" requires a party not to violate those expectations, it is recognizing that sometimes silence says more than [sic] words, and it is understanding its duty to the spirit of the bargain is higher than its duty to the technicalities of the language.

LAWRENCE A. CUNNINGHAM & ARTHUR A. JACOBSON, CORBIN ON CONTRACTS § 570 (Supp. 1984).

Virtually every state agrees with this axiomatic principle. *See, e.g.*, Dunkin' Donuts of Am., Inc. v. Minerva, Inc., 956 F.2d 1566, 1569-70 (11th Cir. 1991) (holding under Massachusetts law, "implied obligation of good faith exists by operation of law"); Louis Glunz Beer, Inc. v. Martlet Importing Co., 864 F. Supp. 810, 817 (N.D. Ill. 1994) (applying implied covenant of good faith and fair dealing in contract and fraud action); Jo-Ann's Launder Ctr. v. Chase Manhattan Bank, N.A., 854 F. Supp. 387 (D.V.I. 1994); Peoples Heritage Sav. Bank v. Recoll Management, Inc., 814 F. Supp. 159, 166 (D. Me. 1993) (finding that "[e]very contract or duty . . . imposes an obligation of good faith in its performance or enforcement"); Union Sav. Am. Life Ins. Co. v. North Cent. Life Ins. Co., 813 F. Supp. 481, 489 (S.D. Miss. 1993) (holding that under Minnesota law, every non-sales contract contains implied covenant of good faith and fair dealing); Metro Communications Co. v. Ameritech Mobil Communications, Inc., 788 F. Supp. 1424, 1431 (E.D. Mich. 1992) (finding that "implied covenant attaches to every contract and 'imposes a limitation on the exercise of discretion vested in one of the parties to a contract'"(quoting Dayan v. McDonald's Corp., 466 N.E.2d 958, 974 (Ill. App. Ct. 1984))), *aff'd*, 984 F.2d 739 (6th Cir. 1993); Zeno Buick-GMC, Inc. v. GMC Truck & Coach, 844 F. Supp 1340, 1348-50 (E.D. Ark. 1992) (holding implied covenant of good faith and fair dealing applies under Michigan common law), *aff'd*, 9 F.3d 115 (8th Cir. 1993); Colville Envtl. Servs., Inc. v. North Slope Borough, 831 P.2d 341, 344 (Alaska 1992) ("In every contract . . . there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other . . ." (quoting Guin v. Ha, 591 P.2d 1281, 1292 (Alaska 1979))); McAlister v. Citibank, 829 P.2d 1253, 1259 (Ariz. Ct. App. 1992); Traumann v. Southland Corp., 858 F. Supp. 979, 983 (N.D. Cal. 1994) (noting that implied covenant of good faith and fair dealing applies, and "[e]ven where one party retains, by virtue of the contract, a right of approval or disapproval or a discretionary power over the rights of the other, such powers must be exercised 'within the parameters of the duty of good faith' . . . *good faith requires that each party act 'reasonably' in light of the 'justified expectations' of the other party.*" (quoting Los Angeles Memorial Coliseum Comm'n v. NFL, 791 F.2d 1356, 1361 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987))); Ervin v. Amoco Oil Co., 885 P.2d 246, 250 (Colo. Ct. App. 1994) (holding every contract, regardless of type, contains an implied

J. *You Need a "Hickey" to Be Together*

Two injuries arising out of two accidents may be joined together in a suit as a matter of right where 1) the second accident contributed to the injury from the first accident and 2) separate trials would create the risk of inconsistent verdicts. In *Hickey v. Pompano K of C*,[226] the Fourth District Court of Appeal stated that if an injury sustained by a person while on one property is later aggravated by an injury sustained on another person's

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covenant of good faith); Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc., 872 P.2d 1359, 1362 (Colo. Ct. App. 1994) (adding that Colorado has recognized separate cause of action for bad faith breach of an insurance contract); Coraccio v. Lowell Five Cents Sav. Bank, 612 N.E.2d 650, 655 (Mass. App. Ct. 1992); Katz v. Oak Indust., Inc., 508 A.2d 873, 880 (Del. Ch. 1986) (noting that "[m]odern contract law has generally recognized an implied covenant to the effect that each party to a contract will act with good faith towards the other"); Idaho First Nat'l Bank v. Bliss Valley Foods, 824 P.2d 841, 862 (Idaho 1992); Waller v. Maryland Nat'l Bank, 620 A.2d 381, 387 (Md. Ct. Spec. App. 1993) (implying duty of good faith and fair dealing); Lemay Bank & Trust Co. v. Harper, 810 S.W.2d 690, 693 (Mo. Ct. App. 1991); Lachenmaier v. First Bank Sys., Inc., 803 P.2d 614, 617 (Mont. 1990) ("[e]very contract, regardless of type, contains an implied covenant of good faith. . . . [B]reach of an express contractual term is not a prerequisite to breach of the implied covenant." (quoting Story v. City of Bozeman, 791 P.2d 767, 775 (Mont. 1990))); Morris v. Bank of Am. Nev., 886 P.2d 454, 457 (Nev. 1994) ("Where one party to a contract 'deliberately countervenes the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing.'" (quoting in part Hilton Hotels Corp. v. Butch Lewis Prod. Inc., 808 P.2d 919, 922-23 (Nev. 1991))); Bak-A-Lum Corp. of Am. v. Alcoa Bldg. Prod. Inc., 351 A.2d 349 (N.J. 1976) (applying implied covenant of good faith); A.W. Fuir Co. v. Ataka & Co., Ltd., 422 N.Y.S.2d 419, 422 (1979) (holding provision giving "absolute and exclusive right to reject any order for any reason whatsoever" does not give party right to arbitrarily refuse to perform); Richard Bruce & Co. v. J. Simpson & Co., 243 N.Y.S.2d 503, 506 (Sup. Ct. 1963) (noting that "absolute discretion" means discretion based on fair dealing and good faith—a reasonable discretion); Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E. 163, 167 (1933) (finding every contract contains an implied covenant of good faith and fair dealing); Dull v. Mutual of Omaha Ins. Co., 354 S.E.2d 752 (N.C. Ct. App.), *review denied*, 358 S.E.2d 518 (N.C. 1987); Adolph Coors Co. v. Rodriguez, 780 S.W.2d 477, 481-83 (Tex. Ct. App. 1989) (concluding all contracts contain an implied covenant of good faith); First Nat'l Bank & Trust Co. of Vinita v. Kissee, 859 P.2d 502, 509 (Okla. 1993) (holding implied covenant of good faith imposed upon all contracting parties by common law); Nelson v. Web Water Dev. Ass'n, Inc., 507 N.W.2d 691, 697-98 (S.D. 1993); Holbrook v. Master Protection Corp., 883 P.2d 295, 300-01 (Utah App. 1994) (upholding an award based on breach of implied covenant of good faith); Betchard-Clayton, Inc. v. King, 707 P.2d 1361, 1364 (Wash. Ct. App. 1985) (finding that "there is an implied duty of good faith and fair dealing imposed on the parties to a contract"); Lonsdale v. Chesterfield, 662 P.2d 385, 387 (Wash. 1983) (finding implied covenant of good faith applies to assignee of contract).

226. 647 So. 2d 270 (Fla. 4th Dist. Ct. App. 1994).

property, those two claims can be joined in a suit against both property owners.[227] The court reasoned that if the cases are tried separately, the jury in the first trial could hold that the damages resulted from the second accident, and a subsequent jury in the second suit could determine that the injuries resulting from the second accident were the result of the damages from the first accident.[228] A low verdict in both trials could thus be entered which would not require a new trial. It would be highly unlikely that a plaintiff would be able to get post-trial or appellate relief in these circumstances, and therefore the plaintiff would not have an adequate remedy by appeal.[229]

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227. *Id.* at 271. The plaintiff's complaint alleged claims against two defendants resulting from separate slip and fall accidents occurring three weeks apart. Plaintiff alleges that the first fall on A's premises injured her knee and made her more susceptible to falling on B's premises and that the second fall aggravated her initial knee injury. To require her to conduct separate trials against both defendants could result in inconsistent verdicts for "which there would be no adequate remedy by appeal." *Id.*

228. *Id.*

229. *Id.*; *see* Lawrence v. Hethcox, 283 So. 2d 41, 44 (Fla. 1973) (holding joinder required where plaintiff sued defendant for injuries sustained in auto accident and later amended complaint to add second defendant involved in second accident about six weeks later). The court so held because injuries from both accidents were overlapping and not apportionable if the cases were tried separately and each defendant might be able to convince the jury that the injuries were caused by the other defendant. *Lawrence*, 283 So. 2d at 44; *see also* Pages v. Dominguez, 652 So. 2d 864, 867 (Fla. 4th Dist. Ct. App. 1995) (holding consolidation of two brother's claims arising out of same accident was properly denied by trial court because claims would require separate and distinct elements of damages and testimony); Maharaj v. Grossman, 619 So. 2d 399 (Fla. 4th Dist. Ct. App. 1993); Meyers v. Shore Indus., Inc., 575 So. 2d 783 (Fla. 2d Dist. Ct. App. 1991); U-Haul Co. of N. Fla., Inc. v. White, 503 So. 2d 332 (Fla. 1st Dist. Ct. App. 1986). In Kraft v. Smith, 148 P.2d 23 (Cal. 1944), the court held the negligence of both defendants contributed approximately to cause an injury for which a plaintiff was entitled to recover. Extreme difficulty of proof as to amount each defendant was responsible required joinder to prevent difficulties of proof which tended to obstruct rather than promote justice arising from separate actions and separate in such a situation. *Id.* at 26. With regard to an injury caused or contributed to by two or more people, see McDonald v. Florida Department of Transportation, 655 So.2d 1164, 1168 (Fla. 4th Dist Ct. App. 1995) (holding intervening act will absolutely absolve original tortfeasor of liability only when it is independent of original negligence and not set in motion by original negligent act—two separate acts can be proximate cause of same injury; if injury is caused by concurring negligence of two or more parties, each of them is liable to same extent as if injury had been caused by each alone); Lovely v. Allstate Ins. Co., 658 A.2d 1091, 1092 (Me. 1995) (where single negligent actor, by aggravating a plaintiff's preexisting injury produces aggregate injury that is incapable of apportionment, that negligent actor is liable for plaintiff's entire amount of damages). The single injury rule, which was previously limited to situations in which tortfeasors caused a single injury that was incapable of

K. *You're Liable to Be Liable*

An attorney can be held liable for legal malpractice even where the plaintiff is neither a client nor in privity of contract with the attorney.[230] In *Rushing v. Bosse*,[231] the Fourth District Court of Appeal held that the special nature of an adoption proceeding permits a cause of action against an attorney for professional negligence even in the absence of privity between the child and the attorney.[232]

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apportionment, has been expanded.

230. Rushing v. Bosse, 652 So. 2d 869, 872-73 (Fla. 4th Dist. Ct. App. 1995). *Accord* Baskerville-Donovan Eng'rs, Inc. v. Pensacola House Condominium Ass'n, Inc., 581 So. 2d 1301, 1303 (Fla. 1991) (holding "lack of privity does not necessarily foreclose liability if a duty of care is otherwise established"); Angel, Cohen & Rogovin, P.A. v. Oberon Inv., N.V., 512 So. 2d 192, 193-94 (Fla. 1987) (finding limited exception to privity requirement where plaintiff is intended third party beneficiary of attorney's actions); Greenberg v. Mahoney, Adams & Criser, P.A., 614 So. 2d 604 (Fla. 1st Dist. Ct. App.), *review denied*, 624 So. 2d 267 (Fla. 1993); *see also* Meighan v. Shore, 40 Cal. Rptr. 2d 744, 754 (Ct. App. 1995) (stating "in California, professional liability is not dependent upon privity of contract, but the presence or absence of a client's intent that the plaintiff benefit from or rely upon the attorney's services is particularly significant in the determination of duty. Intended reliance may be express or implicit, obvious or subtle"); Brennan v. Ruffner, 640 So. 2d 143, 145-46 (Fla. 4th Dist. Ct. App. 1994) (holding rule of privity in legal malpractice actions is relaxed when plaintiff is intended third party beneficiary of contract between attorney and client); Auric v. Continental Casualty Co., 331 N.W.2d 325, 329 (Wis. 1983) (holding beneficiary of will may maintain legal malpractice action against attorney who negligently drafts or supervises execution of will even though beneficiary is not in privity with attorney). *Contra* Aglira v. Julien & Schlesinger, P.C., No. 55165, 1995 WL 567485, at *4 (N.Y. App. Div. Sept. 21, 1995) (holding lack of privity between attorney and infant in medical malpractice case prevents claim based on legal malpractice); C.K. Indus. Corp. v. C.M. Indus. Corp., 623 N.Y.S.2d 410, 411 (App. Div. 1995) (holding legal malpractice plaintiff must establish existence of attorney-client relationship because in absence of fraud, collusion, malicious acts, or other special circumstances, attorney is not liable for harm caused by professional malpractice to third parties).

231. 652 So. 2d 869 (Fla. 4th Dist. Ct. App. 1995). The facts surrounding this decision arose from the alleged misconduct of the attorneys who initiated and continued a private adoption proceeding which resulted in the child being removed from her grandmother and great-grandmother's care for ten months.

232. *Id.* at 872-73. Similarly, in Donahue v. Shughart, Thompson & Kilroy, P.C., 900 S.W.2d 624, 629 (Mo. 1995), the court held that the legal duty of attorneys to non-clients must be determined by weighing the following six factors: 1) the existence of a specific intent by the client that the purpose of the attorney's services was to benefit the plaintiffs; 2) the foreseeability of the harm to plaintiffs as a result of the attorney's negligence; 3) the degree of certainty that the plaintiffs will suffer injury from attorney misconduct; 4) the closeness of the connection between the attorney's conduct and the injury; 5) the policy of preventing future harm; and 6) the burden on the profession of recognizing liability under

L. *Caveat Builder*

The Supreme Court of New Jersey has held that builder-developers and their selling brokers may be held liable for failing to disclose to unwary home buyers offsite conditions which will affect the value and enjoyment of their new homes, which in this case were built near a hazardous waste dump.[233]

M. *If It's Damaged, It May Be Worth More*

Courts, by upholding significant punitive damage awards, are showing how they have become tired of defendants' lack of responsibility.[234]

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the circumstances. In Duffey Law Office, S.C. v. Tank Transp., Inc., 535 N.W.2d 91, 92 (Wis. Ct. App. 1995), the court held that an attorney who represents to a client that the attorney has expertise greater than that of the average lawyer is to be held to the standard of professional care that is consistent with the claimed expertise.

233. Strawn v. Canuso, 657 A.2d 420, 431 (N.J. 1995). The author expects this case to launch a series of actions against real estate organizations, their brokers and other similarly situated persons.

234. *See, e.g.*, Continental Trend Resources, Inc. v. Oxy USA Inc., 44 F.3d 1465, 1478 (10th Cir. 1995). In *Continental*, the court held that a punitive damages award of $30 million was not excessive, even in light of actual damage award being only $269,000. *Id.* at 1479. "The jury apparently considered the wealth of the defendant . . . in determining the amount needed to punish and deter." *Id.* at 1478. Similarly, in Tierney v. Community Memorial General Hospital, 645 N.E.2d 284 (Ill. 1st Dist. App. Ct. 1994), the court held that a $16 million award was not excessive in a medical malpractice case where the injuries were substantial and the suffering was unique. *Id.* at 294. In Oberg v. Honda Motor Co., Ltd., 888 P.2d 8 (Or. 1995), a punitive damages award of $5 million in a products liability action was found to be within the range of what a rational jury would be entitled to award where the defendant knew or should have known, before developing its product that it was likely to cause death or serious bodily injury. *Id.* at 12. The Louisiana Fourth Circuit Court of Appeal, in Department of Transportation & Development v. Schwegmann Westside Expressway, Inc., 651 So. 2d 1359 (La. 4th Cir. Ct. App. 1995), found a severance damages award of $4.85 million was proper where the defendant's appropriation of land for public purposes resulted in a loss of visibility and access to plaintiff's property and subsequently a loss of value of plaintiff's property. *Id.* at 1364-65. In Koplewicz v. Colony Ticket Service, Inc., 620 N.Y.S.2d 384, 384 (N.Y. App. Div. 1995), an award of $680,000 plus attorney's fees, interest, and costs did not materially deviate from a reasonable award for a fractured clavicle. In Duck Head Apparel Co. v. Hoots, 659 So. 2d 897 (Ala. 1995), a further reduction of punitive damages award which had been reduced from $19.5 to $15 million was not supported by a consideration of the defendant's financial position. *Id.* at 915. In Williams v. Rene, 886 F. Supp. 1214 (D.V.I. 1995), an award of $4.5 million was not excessive where an expert testified that the victim's economic damages could reach almost $6 million. *Id.* at 1242. The Supreme Court of Illinois, in Wagner v. City of Chicago, 651 N.E.2d 1120, 1125 (Ill. 1995), upheld a $2.1 million award where the

plaintiff's comparative negligence had already reduced the award and defendant had breached its duty to maintain its property in a reasonably safe condition. In Batiste v. New Hampshire Insurance Co., 657 So. 2d 168 (La. Ct. App. 1995), an increase of the jury's damage award to $250,000 was proper where the evidence showed that the victim suffered a 15% disability of his body as a whole as a result of the accident. *Id.* at 170. An award of $4.20 million was held not to be excessive in Washington v. Barnes Hospital, 897 S.W.2d 611, 611 (Mo. 1995), where a child sustained severe and permanent brain damage as the result of negligent care received immediately prior to and during delivery. *Id.* Similarly, in Luther v. Norfolk & West Railway Co., 649 N.E.2d 1000, 1009 (Ill. App. Ct. 1995), an award of over $1.57 million was not excessive for back injuries which aggravated a degenerative disc disease, resulting in permanent injury and an inability to return to a past position as laborer, absent any indication that the worker presented argument to inflame the passions or prejudices of the jury. *Id.* at 1009. In Doe v. Doe, 657 So. 2d 628, 632 (La. Ct. App. 1995), the court held an award of $750,000 was justified in light of a psychologist's sexual abuse of a patient while the patient was in a severely depressed and suicidal state. *Contra* Chung v. New York City Transit Auth., 624 N.Y.S.2d 224, 225 (App. Div. 1995) (holding award of $1.5 million for past pain and suffering for plaintiff who, after falling from a subway platform lost both legs, was excessive and a reduction to $600,000 was proper); Thibodeaux v. U.S.A.A. Casualty Ins. Co., 647 So. 2d 351, 360-61 (La. Ct. App. 1994) (finding $90,000 award for loss of future earning capacity not error despite expert witness' estimate of $440,000 to $540,000).

Protecting Against the State Constitutional Law Junkyard: Proposals to Limit Popular Constitutional Revision in Florida

Daniel R. Gordon*

TABLE OF CONTENTS

I. INTRODUCTION: 1998 AND PROTECTING THE FLORIDA CONSTITUTION

Nineteen ninety-eight is the year that could save the *Florida Constitution* from being demeaned and trivialized. In 1998, the Florida Constitutional Revision Commission will propose revisions of the *Florida Constitution* to the people of Florida.[1] A constitutional revision commission convenes in Florida each twentieth year after the tenth year following the adoption of the 1968 *Florida Constitution*.[2] The Commission will consist of the Florida Attorney General,[3] fifteen members appointed by the Governor,[4] nine members selected by the Speaker of the Florida House of Representatives,[5] nine members selected by the President of the Florida

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1. FLA. CONST. art. XI, § 2(c).
2. *Id.* § 2(a).
3. *Id.* § 2(a)(1).
4. *Id.* § 2(a)(2).
5. *Id.* § 2(a)(3).

Senate,[6] and three members selected by the Chief Justice of the Supreme Court of Florida with the advice of the justices of the supreme court.[7] The Revision Commission will examine the *Florida Constitution*, except for matters relating directly to taxation and the state budget, by holding public hearings.[8]

The Florida Constitutional Revision Commission should be appointed and begin convening after the close of the 1997 legislative session.[9] Preparations for the convening of the Revision Commission have begun.[10] Already, Floridians have proposed changes to the *Florida Constitution*[11] and have begun discussions about issues that could result in constitutional change.[12] The Revision Commission, like its 1978 predecessor, could review many aspects of Florida constitutional law and government.[13] However, the most important work of the Commission should be preserving the integrity of the *Florida Constitution* by preventing the constitution from being downgraded to statutory law and a constitutional junkyard. The Commission needs to spend a considerable amount of time and resources on considering how the *Florida Constitution* is changed and amended.[14]

Evidence of an emerging state constitutional junkyard was reflected in the recent comments by a Florida Supreme Court justice concerning the *Florida Constitution*, article XI, section 3, the initiative amending process.[15] The supreme court justice complained that the supreme status of Florida constitutional law became threatened by recent proposed amendments to the constitution. Some of those proposed amendments seemed to the supreme court justice to be more appropriate as statutes. The perma-

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6. FLA. CONST. art. XI, § 2(a)(3).

7. *Id.* § 2(a)(4).

8. *Id.* § 2(c). Beginning in 1990 and every tenth year after, a Taxation and Budget Reform Commission meets to examine the Florida state budgetary process, revenue needs, tax structure, and governmental productivity and efficiency. *Id.* § 6.

9. *In re* Advisory Opinion of the Governor Request of Nov. 19, 1976 (Constitution Revision Comm'n), 343 So. 2d 17, 24 (Fla. 1977).

10. Stephen T. Maher, *The Conference on the Florida Constitution*, 68 FLA. B.J. 66 (1994).

11. Thomas C. Marks, Jr. & Alfred A. Colby, *Some Proposed Changes to the Florida Constitution*, 18 NOVA L. REV. 1519 (1994).

12. Stephen T. Maher, *The Florida Cabinet: Is It Time for Remodeling*, 18 NOVA L. REV. 1123 (1994).

13. Stephen J. Uhfelder & Robert A. McNeely, *The 1978 Constitution Revision Commission: Florida's Blueprint for Change*, 18 NOVA L. REV. 1489 (1994).

14. FLA. CONST. art. XI, §§ 1-6.

15. *See* Advisory Opinion to the Att'y Gen. - Limited Marine Net Fishing, 620 So. 2d 997, 999-1000 (Fla. 1993) (McDonald, J., concurring).

nency and supremacy of the *Florida Constitution* remained jeopardized[16] because the *Florida Constitution* lended itself too easily to amendment.[17] What the justice neglected to say was that the Supreme Court of Florida was being converted into a battleground for social[18] and economic[19] issues. This battleground threatens the recent movement of the Supreme Court of Florida toward making the *Florida Constitution* the primary protection for individual rights in Florida.[20] This has occurred by making Florida constitutional adjudication susceptible to challenge in the federal courts, which also happened recently in one other state.[21]

Preservation of the efficacy of the *Florida Constitution* requires reform of the Florida constitutional amendment procedures, especially the initiative procedures[22] which allow the most democratic and politically unrestrained amendments. The initiative procedures in Florida and elsewhere allow interest groups to utilize state constitutions as socio-economic battlegrounds.[23] This article proposes to curb the initiative procedures of the *Florida Constitution.* Not only does the article consider subject matter restrictions on initiative proposals,[24] but the article also considers supermajority and more deliberative techniques for curbing the social and economic passions of Floridians in the context of their state constitution.[25] This article urges that preference be given to more deliberative techniques of constitutional change, such as legislative proposals of constitutional

16. *Id.* at 1000.

17. *Id.* at 1000 n.2.

18. *See In re* Advisory Opinion to the Att'y Gen. - Restricts Laws Related to Discrimination, 632 So. 2d 1018 (Fla. 1994).

19. *See In re* Advisory Opinion to the Att'y Gen. - Save Our Everglades, 636 So. 2d 1336 (Fla. 1994).

20. *See* Traylor v. State, 596 So. 2d 957, 964 (Fla. 1992) (protecting an accused's constitutional right to counsel); *In re* Guardianship of Browning, 568 So. 2d 4, 17 (Fla. 1990) (recognizing constitutional right of privacy for incompetent persons); *In re* T.W., 551 So. 2d 1186, 1201 (Fla. 1989) (concluding that constitutional right to privacy encompasses minor's right to terminate her pregnancy). *See also* Daniel Gordon, *Good Intentions - Questionable Results: Florida Tries the Primacy Model*, 18 NOVA L. REV. 759 (1994) (discussing Florida state constitution).

21. Evans v. Romer, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995).

22. FLA. CONST. art. XI, § 3.

23. *See* William E. Adams Jr., *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 OHIO ST. L.J. 583 (1994).

24. *See Advisory Opinion - Limited Marine Net Fishing*, 620 So. 2d at 1000 (McDonald, T., concurring).

25. *See infra* notes 180-197 and accompanying text.

amendments,[26] although some commentators have questioned the effectiveness of those techniques.[27] Hopefully, the 1998 Florida Constitutional Revision Commission will take action to preserve the supremacy and efficacy of the *Florida Constitution*.

II. SYMPTOMS OF THE EMERGING JUNKYARD

Interest groups are slowly converting the *Florida Constitution* into a private law making mechanism. Groups including environmentalists,[28] agricultural industrialists,[29] and ethnic communities,[30] have utilized the initiative election process as a means either to support or oppose social restrictions[31] and economic benefits.[32] The years since 1988 demonstrate how special interests have enhanced traditional legislative lobbying efforts by appealing to the electorate's power to amend law through the state constitutional initiative process.[33] In the nineteen years between the adoption of the modern *Florida Constitution* in 1968[34] and 1987, seven constitutional amendment initiatives appeared on the ballot.[35] In the eight

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26. Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 718 (1994).

27. Joseph W. Little & Julius Medenblik, *Restricting Legislative Amendments to the Constitution*, 60 FLA. B.J. 43 (1986).

28. The Save our Sealife Committee and the Conservation Committee supported a 1994 initiative limiting certain net fishing off the sea coast of Florida. *Advisory Opinion - Marine Net Fishing*, 620 So. 2d at 997.

29. The United States Sugar Corp. and Flo-Sun, Inc. opposed a 1994 initiative aimed at raising funds to preserve and restore the Everglades. *Advisory Opinion - Save Our Everglades*, 636 So. 2d at 1337.

30. The League of United Latin American Citizens and Haitian American Community Association of Dade opposed a 1988 proposal to make English the official language of Florida. *In re* Advisory Opinion to the Att'y Gen. English - The Official Language of Florida, 520 So. 2d 11, 12 (Fla. 1988).

31. *See Advisory Opinion - Restricts Laws Related to Discrimination*, 632 So. 2d at 1020.

32. *See Advisory Opinion - Save Our Everglades*, 636 So. 2d at 1341.

33. FLA. CONST. art. XI, § 3.

34. *See Twenty-Five Years and Counting: A Symposium on the Florida Constitution of 1968*, 18 NOVA L. REV. 715 (1994).

35. Carroll v. Firestone, 497 So. 2d 1204 (Fla. 1986) (proposing state controlled lottery); Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984) (suggesting civil liability limitations); Fine v. Firestone, 448 So. 2d 984 (Fla. 1984) (concerning taxation limitations); Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337 (Fla. 1978) (relating to casino gambling); Weber v. Smathers, 338 So. 2d 819 (Fla. 1976) (concerning ethics in government); Adams v. Gunter, 238 So. 2d 824 (Fla. 1970) (suggesting a unicameral legislature). In 1986, supporters of legalized gambling again proposed to legalize gambling. Jim Smith,

years since 1988, fourteen constitutional amendment initiatives appeared on the ballot.[36]

The most startling evidence of the interest group creation of a state constitutional junkyard in Florida was the 1994 election year. Between the adoption of the modern *Florida Constitution* in 1968 and the 1992 election, ten constitutional initiative proposals[37] fulfilled the technical requirements for placement on the ballot.[38] In 1994 alone, ten initiative[39] proposals qualified for pre-election initiative judicial review.[40] Before 1994, the most initiative proposals to qualify for ballot inclusion in one year was two.[41] In 1970, 1976, and 1978, only one proposal made it on the ballot.

The types of initiative proposals facing the Florida voters have changed a small, but significant, degree over the past twenty-five years. In 1970 and 1976, the first two initiative proposals under the 1968 constitution involved changes concerning the operations of Florida government.[42] After 1976,

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So You Want to Amend the Florida Constitution? A Guide to Initiative Petitions, 18 NOVA L. REV. 1509, 1511 (1994).

36. *In re* Advisory Opinion to the Att'y Gen. re Tax Limitation, Voter Approval of New Taxes, Property Rights, and Revenue Limits, 644 So. 2d 486 (Fla. 1994) (suggesting four proposals to limit taxes and property regulation); Advisory Opinion to the Att'y Gen. re Limited Casinos, 644 So. 2d 71 (Fla. 1994) (supporting casino gambling); Advisory Opinion to the Att'y Gen. re Stop Early Release of Prisoners, 642 So. 2d 724 (Fla. 1994) (limiting early release of prisoners); Advisory Opinion to the Att'y Gen. re Funding for Criminal Justice, 639 So. 2d 972 (Fla. 1994) (proposing criminal justice trust fund); *Advisory Opinion - Save Our Everglades*, 636 So. 2d at 1337 (raising funds to preserve and restore the Everglades); *Advisory Opinion - Restricts Laws Related to Discrimination*, 632 So. 2d at 1021 (restricting laws protecting against discrimination on the basis of sexual preference); *Advisory Opinion - Limited Marine Net Fishing*, 620 So. 2d at 997 (proposing restrictions on certain fishing nets); Advisory Opinion to the Att'y Gen. - Limited Political Terms in Certain Elective Offices, 592 So. 2d 225 (Fla. 1991) (providing term limits); *In re* Advisory Opinion to the Att'y Gen. - Homestead Valuation Limitation, 581 So. 2d 586 (Fla. 1991) (proposing property tax limitations); *In re* Advisory Opinion to the Att'y Gen., Limitation of Non-Economic Damages in Civil Actions, 520 So. 2d 284 (Fla. 1988) (supporting civil liability limitations); *Advisory Opinion English - The Official Language of Florida*, 520 So. 2d at 12 (suggesting English as the official language).

37. Smith, *supra* note 35, at 1510-11.

38. *See* FLA. STAT. § 100.371 (1993).

39. *See supra* note 36 for a list of 1994 initiative proposals.

40. *See* FLA. CONST. art. V, § 3(b)(10).

41. Two proposals appeared on the ballot in 1984, 1986, 1988, and 1992. Smith, *supra* note 35, at 1511.

42. The 1970 proposal involved the creation of a unicameral legislature, while the 1976 proposal raised the ethical standards for Florida government officials. *See* FLA. CONST. art. II, § 8.

initiative proposals involved not only the functioning of government in Florida but the need of private groups to sponsor their own economic and social interests in government. Since 1968, three general types of proposals have emerged through the initiative process. The first and most common type of initiative sought to transform the structure, responsiveness, and expense of government. Included in this type of initiative were proposals to create a unicameral legislature,[43] strengthen ethical standards for government officials,[44] limit state and local taxes,[45] limit the terms of state and federal elected officials in Florida,[46] keep state prisoners incarcerated,[47] restrict property regulations,[48] and create a state-sponsored lottery.[49] A second type of initiative involved the creation or restriction of economic opportunities. This type of initiative included proposals to create a gambling industry in Florida,[50] limit tort liability,[51] limit fishing methods off the Florida coast,[52] and force the Florida agricultural industry to restore the Everglades.[53] The final type of initiative involved proposals to define group social status within Florida. Two such proposals have either succeeded or been attempted. One required English to be the official language of Florida,[54] thereby relegating other languages to secondary positions. The other attempted to forbid legal protection against discrimina-

43. *Adams*, 238 So. 2d at 825.

44. *Weber*, 338 So. 2d at 820.

45. *Advisory Opinion re Tax Limitation, Voter Approval of New Taxes, Property Rights, and Revenue Limits*, 644 So. 2d at 496; *Advisory Opinion - Homestead Valuation Limitation*, 581 So. 2d at 587; *Fine*, 448 So. 2d at 986.

46. *Advisory Opinion - Limited Political Terms in Certain Elective Offices*, 592 So. 2d at 226.

47. *Advisory Opinion re Stop Early Release of Prisoners*, 642 So. 2d at 725; *Advisory Opinion re Funding for Criminal Justice*, 639 So. 2d at 973.

48. *Advisory Opinion re Tax Limitation, Voter Approval of New Taxes, Property Rights, and Revenue Limits*, 644 So. 2d at 489.

49. *Carroll*, 497 So. 2d at 1205.

50. *Advisory Opinion re Limited Casinos*, 644 So. 2d at 72; *Floridians Against Casino Takeover*, 363 So. 2d at 338. In addition to the two initiatives discussed, a third gambling proposal appeared on the 1986 general election ballot. Smith, *supra* note 35, at 1511.

51. *Advisory Opinion, Limitation of Non-Economic Damages in Civil Actions*, 520 So. 2d at 286; *Evans*, 457 So. 2d at 1353.

52. *Advisory Opinion - Limited Marine Net Fishing*, 620 So. 2d at 997-98.

53. *Advisory Opinion - Save Our Everglades*, 636 So. 2d at 1337-38.

54. *Advisory Opinion English - The Official Language of Florida*, 520 So. 2d at 12.

tion on the basis of sexual orientation,[55] thereby relegating homosexuals to second class political representation.[56]

After 1976, initiatives for economic opportunities became periodic proposals on the Florida political and legal landscape. One economics opportunities constitutional amendment was proposed for placement on the ballot in each general election of 1978,[57] 1984,[58] 1986,[59] and 1988.[60] However, not all made it on the ballot. In 1994, two economics opportunities proposals made it onto the ballot,[61] while one failed in pre-election judicial review.[62] Social status proposals emerged in the late 1980s. In 1988, one appeared on the ballot;[63] however, another failed to survive judicial review in 1994.[64] The greatest number of proposals involved the structure, responsiveness, and expense of government. Over the years since the adoption of the modern *Florida Constitution* in 1968, twelve such proposals have either appeared on the ballot or been struck down by the Florida courts prior to the election.[65]

Indicative of the emerging junkyard in the *Florida Constitution* is what has transpired since 1988. Prior to 1988, only three economics opportunities initiative proposals surfaced in almost twenty years. Since 1988, not only have four economics opportunities proposals surfaced in six years, but a whole new category, the social status initiative proposal, has emerged. This suggests that the initiative proposal process quickly is transforming from a way for the people of Florida to influence the structure and operations of

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55. *Advisory Opinion - Restricts Laws Related to Discrimination*, 632 So. 2d at 1019.

56. *See generally* Adams, *supra* note 23.

57. *Floridians Against Casino Takeover*, 363 So. 2d at 338.

58. *Evans*, 457 So. 2d at 1353.

59. The initiative in 1986 was another attempt to legalize gambling. Smith, *supra* note 35, at 1511.

60. *Advisory Opinion, Limitation of Non-Economic Damages in Civil Actions*, 520 So. 2d at 286.

61. *Advisory Opinion re Limited Casinos*, 644 So. 2d. at 72; *Advisory Opinion - Limited Marine Net Fishing*, 620 So. 2d at 997-98.

62. *Advisory Opinion - Save Our Everglades*, 636 So. 2d at 1342.

63. *Advisory Opinion English - The Official Language of Florida*, 520 So. 2d at 13.

64. *Advisory Opinion - Restricts Laws Related to Discrimination*, 632 So. 2d at 1021.

65. *See Advisory Opinion re Tax Limitation, Voter Approval of New Taxes, Property Rights, and Revenue Limits*, 644 So. 2d at 489; *Advisory Opinion re Stop Early Release of Prisoners*, 642 So. 2d at 727; *Advisory Opinion re Funding for Criminal Justice*, 639 So. 2d at 974; *Advisory Opinion - Limited Political Terms in Certain Elected Offices*, 592 So. 2d at 229; *Advisory Opinion - Homestead Valuation Limitation*, 581 So. 2d at 588; *Carroll*, 497 So. 2d at 1205; *Fine*, 448 So. 2d at 986; *Weber*, 338 So. 2d at 822; *Adams*, 238 So. 2d at 832.

their government to a means for promoting economic change and social ordering.

III. AWAY FROM A MODERN CONSTITUTION AND TOWARD SOCIO-ECONOMIC SYMBOLISM

The initiative process is converting the *Florida Constitution* into something that the authors of the 1968 constitution, who worked to create a modern state constitution,[66] which serves as a flexible and adaptable instrument that enables a state government to work with efficiency and economy, did not intend.[67] A modern state constitution possesses internal discipline focusing on only what is necessary to support the people's demands for services and regulatory protections.[68] A state constitution should remain brief, limited to the basics.[69] The subject matter included in a state constitution should reflect the core of state government avoiding what would reasonably be considered legislative matters,[70] because constitutionalizing legislative matter places that matter beyond amending by normal law making processes.[71] Including too many matters within a state constitution can lead to legal fossilization which undermines flexibility in serving the needs of the people through legislative and regulatory processes.

The 1968 *Florida Constitution* reflects flexible constitutional modernism which focuses on core matters. In the early 1960s, the demands of reapportionment and equal representation in the political process[72] shifted power in Florida from rural areas to emerging cities and suburbs.[73] This new, more urban, political alignment created a movement to modernize and streamline Florida government.[74] The modern *Florida Constitution* flowed from such a reform-minded context. The 1968 *Florida Constitution* shrunk to almost half the size of the text of the amended 1885 *Florida Constitution*.[75] Not only were racist provisions of the 1885 constitution eliminat-

66. *See* TALBOT D'ALEMBERTE, THE FLORIDA STATE CONSTITUTION, A REFERENCE GUIDE 11-12 (1991).

67. *See* Frank P. Grad, *The State Constitution: Its Function and Forum for Our Time*, 54 VA. L. REV. 928, 928-29 (1968).

68. *Id.* at 939-40.

69. *Id.* at 942.

70. *Id.* at 945.

71. *Id.* at 946.

72. *See* Baker v. Carr, 369 U.S. 186 (1962).

73. *See* D'ALEMBERTE, *supra* note 66, at 12.

74. *Id.*

75. *Id.*

ed[76] in favor of clear and direct protection of human rights,[77] but a modernized Florida government was fashioned through a simple and flexible constitution.[78]

The internal structure of the 1968 *Florida Constitution* reflects simplicity devoted to structuring government to serve and regulate. The document defines the basics. The constitution lays out the foundation of governance such as state boundaries,[79] branches of government,[80] seats of government,[81] and elections.[82] The powers[83] and expectations[84] of the legislature are defined, along with the powers of the executive branch[85] and the jurisdiction of the judiciary.[86] Taxation[87] and the structure and powers of local government[88] constitute the subjects for most of the remaining content of the 1968 constitution. Most of the 1968 *Florida Constitution* creates decision-makers[89] or decisional processes.[90] Very few specific topics or subjects exist within the constitution. Those that do exist, such as education,[91] natural resources, and scenic beauty,[92] impact most if not all people in Florida. A miscellaneous section[93] includes only fifteen sections dealing most often with generalized issues such as eminent domain,[94] sovereign immunity,[95] and an official census.[96]

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76. FLA. CONST. art. XVI, § 24, art. XII, § 12 (1951).
77. *See* FLA. CONST. art. I, §§ 2, 9.
78. *See* D'ALEMBERTE, *supra* note 66, at 11; James Bacchus, *Legislative Efforts To Amend The Florida Constitution: The Implications of* Smathers v. Smith, 5 FLA. ST. U.L. REV. 747, 748 (1977).
79. FLA. CONST. art. II, § 1.
80. *Id.* § 3.
81. *Id.* § 2.
82. *Id.* art. VI.
83. *Id.* art. III, § 1.
84. FLA. CONST. art. III, §§ 4, 6.
85. *Id.* art. IV, § 1.
86. *Id.* art. V, §§ 3-6.
87. *Id.* art. VII.
88. *Id.* art. VIII.
89. *See, e.g.*, FLA. CONST. art. VI, § 4.
90. *See, e.g., id* art. V, § 3(b)(1).
91. *Id.* art. IX.
92. *Id.* art. II, § 7.
93. *Id.* art. X.
94. FLA. CONST. art. X, § 6.
95. *Id.* § 13.
96. *Id.* § 8.

The initiative amendment provision in article XI must be read in the context of the 1968 *Florida Constitution* that creates economic and efficient government able to respond flexibly to the problems of Florida. The initiative process remains the most restrictive method for changing the *Florida Constitution*,[97] reserving the right to revise or amend any portion of the *Florida Constitution* to Floridians, but only when a revision or amendment embraces one subject.[98] The one subject rule has been read narrowly by the Florida courts to prevent log rolling where voters were forced to choose between something they favored and disfavored in one proposal.[99] The initiative procedure is an onerous one requiring the signatures of hundreds of thousands of Florida voters.[100] The initiative process remains limited and tedious in order to preserve the streamlined modernity of the 1968 *Florida Constitution.*

The initiative provision strikes a balance between populist democracy and republican, deliberative, representative government in Florida. The initiative allows the people of Florida to propose singular reforms in the functions and structure of their state government.[101] The process remains more restrictive than legislative proposals to amend the *Florida Constitution.*[102] Even a constitutional convention has seemingly unfettered power to reconsider and rewrite the whole constitution.[103] The initiative process remains restrictive compared with legislative proposals and a constitutional convention because the initiative process lacks the deliberative tools of the legislature and a constitutional convention such as public hearings, committee studies, and disciplined public debates.[104] The Florida initiative process reflects a rule of self-restraint adopted by the people of Florida to protect against precipitous and spasmodic changes in Florida organic law.[105]

The 1968 *Florida Constitution* was intended to create efficient and economic government limited by human rights protections.[106] The initiative process allowed the people of Florida to make changes to the

97. *See* D'ALEMBERTE, *supra* note 66, at 148.

98. *See* FLA. CONST. art. XI, § 3.

99. *See Fine*, 448 So. 2d at 988-89. *See also* Marks & Colby, *supra* note 11, at 1572-81.

100. *See* FLA. CONST. art. XI, § 3.

101. *See Fine*, 448 So. 2d at 988.

102. *See* FLA. CONST. art. XI, § 1.

103. *See id.* § 4.

104. *See Weber*, 338 So. 2d at 824 (Roberts, J., dissenting).

105. *See Adams*, 238 So. 2d at 832 (Thornal, J., concurring).

106. *See supra* notes 66-76 and accompanying text.

functions and structures of their government. Unfortunately, since 1988, initiatives have been utilized to position populations of Florida both socially and economically.[107] Initiatives have become an alternative to the deliberative processes of the legislature. Interest groups have added the initiative process as a method for achieving public policy objectives in addition to lobbying the legislature. For many of these groups, the *Florida Constitution* has been transformed from a modern document of governance to a socio-economic or ideological battle ground. Between 1968 and 1987, thirteen organizations made appearances before the Supreme Court of Florida when the court considered challenges to initiative proposals,[108] while between 1988 and 1995, seventy such organizations made such appearances before the Supreme Court of Florida.[109] To some extent, this increase reflects a

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107. *See supra* notes 36-56 and accompanying text. *See generally* Suzanne B. Goldberg, *Facing the Challenge: A Lawyer's Response to Anti-Gay Initiatives*, 55 OHIO ST. L.J. 665 (1994).

108. The organizations that made appearances between 1968-1987 were as follows: Excellence Campaign: An Educational Lottery, Inc. ("E.X.C.E.L.") (1986), Florida Teaching Profession - National Education Association (1986), People Against Legalized Lotteries (1986), American Civil Liberties Foundation of Florida (1984), Florida Citizens for Tax Relief and Limited Government Committee (1984), Florida Consumer Federation (1984), Florida Education Association/United (1984), Floridians for Tax Relief (1984), Pacific Legal Foundation (1984), Reason 84: The Committee for Citizens Rights (1984), Southeastern Legal Foundation (1984), Floridians Against Casino Takeover (1978), The Tenants Association of Florida (1978).

109. The organizations that made appearances between 1988-1995 were as follows: American Civil Liberties Union Foundation of Florida, Inc. (1994), American Family Political Committee (1994), American Planning Association, Florida Chapter (1994), American Tax Reduction Movement (1994), Associated Industries of Florida (1994), Bally Mfg. Corp. (1994), Broward County Hispanic Bar Association (1994), Citizens for a Safe Florida (1994), Common Cause (1994), Conservation Coalition (1994), Defenders of Property (1994), Farm Credit of Northern Florida, ACA (1994), Farm Credit of Northwest Florida, ACA (1994), Farm Credit of Southern Florida, ACA (1994), Farm Credit of Southwest Florida, ACA (1994), FEA/United (1994), Florida Association of Community Relations Professions (1994), Florida Audobon Society (1994), Florida Chamber of Commerce (1994), Florida Farmers Fairness Committee (1994), Florida Foresty Association (1994), Florida Farm Bureau Federation (1994), Florida Fruit and Vegetable Association (1994), Florida League of Cities, Inc. (1994), Florida Locally Approved Gaming, Inc. (FLAG) (1994), Florida Public Interest Law Section (1994), The Florida Sugar Cane League, Inc. (1994), Florida Tax Reduction Movement, Inc. (1994), Florida Wildlife Federation (1994), Flo-Sun, Inc. (1994), Friends of Florida, Inc. (1994), FTP/NEA (1994), Howard Jarvis Tax Payer's Association (1994), League of Women Voters (1994), Limited Casinos Inc. (1994), National Federation of Independent Business (1994), National Tax Payer's Union (1994), No Casinos, Inc. (1994), Proposition for County Choice Gaming, Inc. (1994), Save Our Everglades Committee (1994), Save Our Sea Life Committee (1994), Sierra Club (1994), Southeastern Legal Foundation

1986 Florida constitutional amendment that formalized the pre-election judicial review process for initiatives.[110] However, the dramatic 500% increase in participating organizations evidences something deeper. Additionally, the types of organizations militating for and against constitutional change have shifted in the nature of their interests.

Until 1988, the organizations involved in ballot questions tended to be general lobbying organizations such as the American Civil Liberties Union Foundation of Florida,[111] the Florida Education Association,[112] the National Educational Association,[113] the Florida Consumer Federation,[114] or organizations that focused on the narrow issues involved in the constitutional amendment proposals such as Floridians Against Casino Takeover,[115] People Against Legalized Lotteries,[116] or Excellence Campaign: An Education Lottery, Inc. ("E.X.C.E.L."). [117] In the period prior to 1988, some out of state organizations such as the Pacific Legal Foundation[118] participated in the struggle for state constitutional change in Florida.

Since 1988, organizational participation evidences social and economic struggles between broad based and substantial economic and social interests. General lobbying organizations, such as the American Civil Liberties Union,[119] and organizations focusing narrowly on the constitutional

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(1994), Sugar Cane Growers Co-op of Florida, Inc. (1994), Tax Cap Committee (1994), United States Sugar Corp. (1994), Citizens for Limited Political Terms (1992), Let The People Decide - Americans for Ballot Freedom (1992), National Conference of State Legislatures (1992), Save Our Homes, Inc. (1992), Southern Legislative Conference of State Governments (1992), Tax Cap Foundation, Inc. (1992), Term Limits Legal Institute (1992), Academy of Florida Trial Lawyers (1988), American Civil Liberties Union of Florida, Inc. (1988), Aspira of Florida (1988), Bilingual Association of Florida (1988), Coalition of Hispanic American Women (1988), Committee for Constitutional Honesty (1988), Cuban American Democratic Association of Florida (1988), English First (1988), Florida Committee for Liability Reform (1988), Florida English Campaign (1988), Greater Miami United (1988), Haitian American Community Association of Dade (1988), League of United Latin American Citizens (1988), Mexican American Legal Defense and Educational Fund (1988), National Conference of Puerto Rican Women - Miami Chapter (1988), Puerto Rican Legal Defense and Education Fund (1988), United States English Legislative Task Force, Inc. (1988).

110. FLA. CONST. art. IV, § 10.
111. *See Fine*, 448 So. 2d at 985.
112. *Id.*
113. *See Carroll*, 497 So. 2d at 1205.
114. *See Evans*, 457 So. 2d at 1352.
115. *See Floridians Against Casino Takeover*, 363 So. 2d at 338.
116. *See Carroll*, 497 So. 2d at 1205.
117. *Id.*
118. *Fine*, 448 So. 2d at 985.
119. *Advisory Opinion - Restricts Laws Related to Discrimination*, 632 So. 2d at 1018.

amendment question, such as Limited Casinos, Inc.,[120] continue to participate. However, these organizations have been joined by others that represent the social interests of millions of people throughout the United States such as the Mexican American Legal Defense and Educational Fund[121] and the Puerto Rican Legal Defense and Educational Fund.[122] Corporate America, including Bally Manufacturing Corporation,[123] Flo-Sun, Inc.,[124] United States Sugar Corporation,[125] and the Florida Farm Bureau,[126] jumped into the Florida state constitutional fray along with those who sought to regulate business and property owners, especially in the environmental realm, including the Sierra Club,[127] the Florida Wildlife Federation,[128] and the Florida Audobon Society.[129]

The numbers and types of interest organizations participating in constitutional amendment litigation evidence the high social and economic stakes perceived to be at risk in either the passage or defeat of the amendment proposals. The money infused into the battles over those proposals also evidences the enormity of the perceived impact of these amendment proposals on social status and corporate bottom lines. In one campaign alone, during the Fall of 1994, $16,531,063 was raised to convince the people of Florida to vote in favor of the proposal.[130] In the weeks before election day, $5,241,984 was contributed by sixty-nine contributors, many of whom were from out of state.[131] On November 1,

120. *Advisory Opinion re Limited Casinos*, 644 So. 2d at 72.

121. *Advisory Opinion English - The Official Language of Florida*, 520 So. 2d at 12.

122. *Id.*

123. *Advisory Opinion re Limited Casinos*, 644 So. 2d at 72.

124. *Advisory Opinion - Save Our Everglades*, 636 So. 2d at 1337.

125. *Id.*

126. *Advisory Opinion re Tax Limitation, Voter Approval of New Taxes, Property Rights, and Revenue Limits*, 644 So. 2d at 488.

127. *Id.* at 489.

128. *Id.*

129. *Advisory Opinion - Save Our Everglades*, 636 So. 2d at 1337.

130. Florida Dep't of State, Division of Elections, Campaign Treasurer's Report, Proposition for Limited Casinos, Inc., Summary Sheet for 11-4-94 to 12-31-94, p.2. *See generally* Julian N. Eule, *Crocodiles in the Bath Tub: State Courts, Voter Initiatives and Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 737 (1994); Gilbert Hahn III & Stephen C. Morton, *Initiative and Referendum - Do They Encourage or Impair Better State Government*, 5 FLA. ST. U.L. REV. 925, 941 (1977).

131. Florida Dep't of State, Division of Elections, Campaign Treasurer's Report, Proposition Limited Casinos, Inc., Summary Sheet for 10-15-94 to 11-3-94, p.2.

1994, a single out of state corporate supporter of the proposed amendment gave $1,000,000.[132]

Consumer, corporate, and ethnic America engaged in battles over, rather than refined, the modern and flexible *Florida Constitution*. Corporate, ethnic, and environmental interests sought either to create or limit economic opportunities, or to limit social status. In one proposal, environmentalists sought to require the Florida sugar cane industry to pay to clean up pollution in the Everglades. All sugar cane grown in and near the Everglades would be taxed one cent per pound, indexed for inflation for twenty-five years, with the tax receipts placed into a trust fund.[133] A second proposal sought to permit small and set numbers of gambling casinos in a few, restricted areas of Florida.[134] Another proposal sought to prevent the legislature, county commissions, and city commissions from enacting laws that protect homosexuals from discrimination.[135] A final proposal sought to establish English as the official language of Florida.[136]

All four proposals share much in common. The proposals would have only tangentially restructured or refined state government. Unlike other proposals that primarily sought to change the workings of state and local government,[137] these proposals focused on changing human behavior or relationships. The proposal requiring the sugar industry to underwrite the costs of restoring the Everglades sought to shift a large measure of wealth away from one industry for a single public purpose. Such an arrangement failed to benefit the broad governmental purposes intended to be served by general taxation.[138] The casino gambling proposal failed to authorize the Florida Legislature to allow gambling within Florida. Instead, the provision created a constitutionally mandated monopoly for a relatively small number of gambling establishments. The opening of additional casinos in the future would require a subsequent amendment to the *Florida Constitution*.[139] The anti-gay and English only proposals subjected sizable subpopulations in Florida to legislative inflexibility and diminished legal status. No longer could the legislature protect homosexuals from discrimination.[140] Those

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132. *Id.* at 1.

133. *Advisory Opinion - Save Our Everglades*, 636 So. 2d at 1338.

134. *Advisory Opinion re Limited Casinos*, 644 So. 2d at 72-73.

135. *Advisory Opinion - Restricts Laws Related to Discrimination*, 632 So. 2d at 1019.

136. *Advisory Opinion English - The Official Language of Florida*, 520 So. 2d at 12.

137. *See Advisory Opinion re Tax Limitation, Voter Approval of New Taxes, Property Rights, and Revenue Limits*, 644 So. 2d at 490 (proposing constitutional limit to new taxes).

138. *See, e.g.*, FLA. CONST. art. VII, § 1.

139. *See id.* art. XI.

140. *See* Adams, *supra* note 23.

who spoke other languages would be relegated to a second class status by their state and local governments as a result of English speakers being favored constitutionally.

The proposals concerning English as an official language, restrictions on protecting homosexuals from discrimination, creation of a gambling casino monopoly, and taxation of the sugar industry pitted groups of Floridians against each other, or encouraged one group to economically exploit another. The *Florida Constitution* has become a weapon in the war over public policy rather than a tool used to protect human rights and enhance effective state government. A victory in such a war symbolizes one economic or social force gaining an advantage over others. The initiative process is converting the *Florida Constitution* from a tangible device supporting law and human rights to a format for symbolic socio-economic struggle. A constitution utilized in socio-economic struggles is transformed into a symbolic value system of social and economic inclusion and exclusion.[141] The *Florida Constitution* risks becoming a vehicle for societal discourse[142] instead of a protection from closely defined governmental and legal power.[143] The initiative process threatens to convert the *Florida Constitution* into an unintelligible babble reflecting clashing localized and special interest values.[144] The initiative process must be reformed to protect the 1968 *Florida Constitution* as a modern instrument empowering efficient and effective government that respects human rights.[145]

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141. *See generally* KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION (1993); KENNETH L. KARST, BELONGING IN AMERICA (1989).

142. *See* Neil H. Cogan, *In Praise of Diverse Discourse*, 5 ST. THOMAS L. REV. 173 (1992); James A. Gardner, *Discourses and Difference A Reply to Parness and Cogan*, 5 ST. THOMAS L. REV. 193 (1992); Jeffrey A. Parness, *Failed or Uneven Discourse of State Constitutionalism? Governmental Structure and State Constitutions*, 5 ST. THOMAS L. REV. 155 (1992).

143. *See* Daniel R. Gordon, *Super Constitutions Saving The Shunned: The State Constitutions Masquerading As Weaklings*, 67 TEMP. L. REV. 965, 970-79 (1994).

144. *See* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

145. *See supra* notes 106-129 and accompanying text.

IV. PREVENTING THE EMERGING JUNKYARD: LIMITING DIRECT DEMOCRACY IN FLORIDA

The 1998 Constitutional Revision Commission[146] needs to consider ways to inhibit the initiative process in Florida from converting the *Florida Constitution* from a modern instrument of efficient government and protection against governmental power to a socio-economic interest group war zone. The single subject and signature requirements[147] for initiative proposals have helped curb some socio-economic status defining proposals.[148] Some proposals for shifting social status and economic power in Florida were too complicated and omnibus to meet the single subject rule. For instance, the proposal to restrict anti-discrimination protections for homosexuals impacted municipal home rule powers, such as the basic rights of all natural persons, the right to bargain collectively, and rights involving ten enumerated classifications of people.[149] Voters could have been placed in the position of being log-rolled because they would have to choose between ideas they both supported and opposed in a single proposal.[150] Furthermore, the initiative proposal involved discrimination which the Supreme Court of Florida found expansively encompassed civil rights and the power of all government.[151] The initiative proposal failed to come even close to meeting the single subject rule. However, some socio-economic status defining proposals easily met the single subject rule and other requirements.[152] The 1998 Revision Commission should consider adding substantive restrictions on what can be proposed in an initiative proposal.

The addition of four substantive restrictions along with the procedural single subject rule and signature requirements should help to limit the use of initiatives as tools in socio-economic struggles in Florida. The following

146. FLA. CONST. art. XI, § 2.

147. *Id.* § 3. *See also* Cherie B. Albury, Comment, *Amendment Nine and the Initiative Process: A Costly Trip to Nowhere*, 14 STETSON L. REV. 349 (1985).

148. *See Advisory Opinion - Restricts Laws Related to Discrimination*, 632 So. 2d at 1020; *Advisory Opinion - Save Our Everglades*, 636 So. 2d at 1339-40.

149. *Advisory Opinion - Restricts Laws Related to Discrimination*, 632 So. 2d at 1020.

150. *Id.*

151. *Id.*

152. *See Advisory Opinion re Limited Casinos*, 644 So. 2d at 75; *Advisory Opinion - Limited Marine Net Fishing*, 620 So. 2d at 997; *Advisory Opinion English - The Official Language of Florida*, 520 So. 2d at 11; *Advisory Opinion, Limitation of Non-Economic Damages in Civil Actions*, 520 So. 2d at 287.

four limitations should be added to the Florida constitutional provision regulating election of constitutional amendment or revision:[153]

1) There shall be approval of 60% of electors voting in a general election for any initiative proposals involving changes:

A. to article I;

B. to article X, section 4; or

C. that the Supreme Court of Florida in its pre-election review of an initiative deems will diminish equality and equal protection before the law.

2) No article I right may be directly diminished by an initiative procedure. The Supreme Court of Florida shall possess the jurisdiction to determine whether an initiative proposal diminishes an article I right.

3) No change to the *Florida Constitution* may be made by initiative when that change involves a limited economic or social interest. The Supreme Court of Florida shall possess the jurisdiction to determine whether an initiative proposal involves a limited economic or social interest.

The following requirement should be added to the Florida constitutional provision empowering the legislature to propose amendments or revisions to the *Florida Constitution*:[154]

4) Before an amendment or revision to change article I may appear on a general election ballot, that proposal, change, or amendment, must be approved by the Florida Legislature after two consecutive general elections.

These four proposed changes to article XI reflect a balance between republicanism and popular democracy in Florida. The first proposal allows the people of Florida to utilize the initiative proceedings to add human rights protections to article I, to change the homestead protection,[155] and to enhance equal protection. However, the super-majority requirement encourages the creation of a popular consensus, or at a minimum, strong public support for the change. The super-majority also discourages such initiatives by making ultimate electoral success that much more difficult. The second proposal blocks popular democratic change through the initiative process when a proposal directly diminishes an article I right. This would still allow initiative proposals involving executive[156] and legislative powers[157] that may indirectly diminish article I rights. This proposal also allows the people of Florida to diminish their basic rights through the

153. FLA. CONST. art. XI, § 5.
154. *Id.* § 1.
155. *Id.* art. X, § 4.
156. *Id.* art. IV.
157. *Id.* art. III.

deliberative legislative[158] and constitutional convention[159] amending processes. The will of the people of Florida to diminish the rights of all or some residents of Florida would be mediated through the established processes of republican discourse.[160] The last two proposals both diminish the lure of the initiative process for special interest lobbying groups[161] and strengthen the deliberative and thoughtfulness of republicanism in Florida.[162]

The pro-republican text of these four proposals exemplifies the tensions between republicanism and direct democracy in Florida constitutional law during the past twenty-five years. The Supreme Court of Florida has shown restraint in blocking initiative proposals from being placed on the general election ballot. This is because the court has recognized that ultimate sovereignty resides in the people of Florida, which is a reflection of the state's constitutional democracy. So long as the people of Florida abide by the *United States Constitution*, they should be able to amend their constitution in ways they see fit.[163] However, the Supreme Court of Florida strongly tempered its sensitivity to popular democracy when the court recognized that the people of Florida injected the single subject requirement in the initiative process as a rule of self-restraint on populist decisions. The rule of self-restraint protected the people of Florida against their own desire to make precipitous and spasmodic changes in Florida organic law.[164] The Florida courts play an important role in guarding that self-restraint by insuring the single subject and other initiative requirements are satisfied.[165] The Supreme Court of Florida also recognized that the initiative procedure should never be utilized to bring about revolutionary or far-reaching change. Constitutional conventions exist for that purpose.[166] Restraint of populism was necessary to preserve the *Florida Constitution* as a basic document that controls governmental functions, including republican functions.[167] The 1968 *Florida Constitution* could not be converted into an amended jumble

158. FLA. CONST. art. XI, § 1.

159. *Id.* § 4.

160. *See* Hans A. Linde, *When Initiative Law Making Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 32-33 (1993).

161. *See supra* notes 107-132 and accompanying text.

162. *See infra* notes 170-175 and accompanying text.

163. *See Floridians Against Casino Takeover*, 363 So. 2d at 342 (Boyd, J., concurring specially); *Weber*, 338 So. 2d at 821.

164. *See Adams*, 238 So. 2d at 832 (Thornal, J., concurring).

165. *Id.*

166. *Id.* at 831.

167. *See Fine*, 448 So. 2d at 989.

as the 1885 *Florida Constitution* had been.[168] Overall, the Supreme Court of Florida found that the single subject and other initiative requirements favored, and even protected, republicanism in Florida.[169]

The tension between popular democracy and republicanism in Florida reflects a recent national legal scholarship discussion concerning the merits of the two opposing viewpoints.[170] Initiatives, as a strong form of popular democracy, serve to overcome entrenched factional interests. When legislative bodies refuse to reform themselves, initiatives serve to supplement representative government, correcting egregious legislative excesses.[171] Republican government was constituted in the United States to foster popular democracy.[172] Direct vehicles of democracy such as initiatives are integral parts of the American republican system.[173] The pro-republican critics of direct popular democracy are not fueled by concerns of legislative excesses and the need for the people to reform and control their government. Instead, the republican critics of popular democracy oppose the use of initiatives as a means to stigmatize minority groups through law.[174] More specifically, the modern champions of republicanism fear the initiative as a means of blocking minorities from lobbying in state legislatures and local commissions for equal and human rights and from being protected equally by state law and the political process.[175]

Those who both favor and fear initiatives fail to focus on the same issues. Those who favor initiatives fear unresponsive representative

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168. *See Evans*, 457 So. 2d at 1358 (McDonald, J., concurring).

169. *See supra* notes 163-168 and accompanying text.

170. For an excellent overview of the modern debate and a bibliography, see William E. Adams, Jr. Anti-Gay Ballot Initiative - The Technical Challenges, Pamphlet distributed at the Annual Meeting of the Gay and Lesbian Legal Issues Section of the Association of American Law Schools (Jan. 6, 1995).

171. *See* Dennis V. Arrow, *Representative Government and Popular Distress: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment by Initiative Petition*, 17 OKLA. CITY U.L. REV. 5, 39, 44-45, 48-49, 53 (1992).

172. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 757-58 (1994).

173. *Id.* at 761.

174. *See* Adams, *supra* note 23, at 831; Linde, *supra* note 160, at 37-38; James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43 (1983).

175. *See* Adams, *supra* note 23, at 602-3; Fischer, *supra* note 174, at 69; Linde, *supra* note 26, at 709, 721-23; Linde, *supra* note 160, at 41-42.

government,[176] while those who criticize initiatives fear popular and biased passions.[177] Florida constitutional philosophy shifts the democracy-republican balance toward responsive government and against less deliberative popular democracy.[178] Hence, Florida constitutional philosophy fails directly to reflect the concerns of the modern critics and devotees of initiative processes. Florida republican philosophy strengthens legislative power,[179] but evidences little or no concern for majoritarian ballot box oppression of socially or economically disadvantaged groups. However, the Floridian preference for republicanism indirectly serves the minority protective interests of those who fear initiatives. The power of the initiative remains somewhat limited, while the Florida Legislature remains accessible as the law maker even to minorities.

Proposals to require super-majorities for initiative proposals involving human rights and to restrict initiative proposals that diminish human rights fit well with traditional Florida constitutional philosophy. Traditionally, Florida constitutional philosophy has favored republicanism over direct democratic law making. The Florida Legislature would remain open to those who petition for greater human rights protections, and the basic rights already guaranteed in the 1968 *Florida Constitution* would remain protected. Proposals to curb initiatives that threaten human rights, or require super-majorities for constitutional change, are not unprecedented both in and out of Florida.[180] In fact, some states already include substantive restrictions to initiatives or super-majority requirements within their constitutions. California prohibits all referenda and initiatives that name any individual to office or assign any power or duty to a private corporation.[181] Illinois restricts the subject of constitutional initiatives to proposals that would change the structure and procedure of the legislature.[182] Massachusetts forbids initiative amendments relating to religion, religious matters, or religious institutions.[183] Initiatives in Illinois require for passage either

176. *See* Arrow, *supra* note 171, at 44-46.

177. *See* Linde, *supra* note 26, at 721-25.

178. *See Fine,* 448 So. 2d at 988-89; *Weber,* 338 So. 2d at 823-24 (England, J., concurring and Roberts, J., dissenting); *Adams,* 238 So. 2d at 832.

179. *See Fine,* 448 So. 2d at 989.

180. *See* Little & Medenblik, *supra* note 27, at 45; Christopher A. Coury, Note, *Direct Democracy Though Initiative and Referendum: Checking the Balance*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 573, 590-92 (1994).

181. CAL. CONST. art. II, § 12.

182. ILL. CONST. art. XIV, § 3. *See also* Fischer, *supra* note 174, at 55 n.58.

183. MASS. CONST. art. 48, Part II, § 2. *See also* Alexander G. Gray, Jr., & Thomas R. Kiley, *The Initiative and Referendum in Massachusetts*, 26 NEW ENG. L. REV. 27, 54-56

approval by 60% of the people voting on the proposal or a majority of people voting in the state wide election.[184] Even states that allow only legislative proposals of constitutional amendments require super- majorities. New Hampshire requires 66% approval of people voting[185] while New Mexico requires 75% for proposed amendments involving the elective franchise or Hispanic education.[186]

The super-majority and subject restriction proposals for the initiatives will go a long way toward preventing the *Florida Constitution* from becoming a socio-economic status defining junkyard. Two additional proposals should help to preserve the integrity of the *Florida Constitution.* First, no initiative will be permitted when the initiative involves a limited economic or social interest.[187] Such a restriction should stop special interest groups from using the *Florida Constitution* as a means to attaining very limited economic or social goals such as creating an economic monopoly[188] or restricting one type of behavior such as homosexuality.[189] Such a restriction also finds support in Florida constitutional jurisprudence which has disfavored law that restricted social[190] and economic[191] opportunities to the detriment of small classes or interests.[192] Second, the last proposal of the four discussed in this article[193] would require that any legislatively proposed changes to article I be

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(1991).

184. ILL. CONST. art. XIV, § 3.

185. N.H. CONST. art. 100. *See also* Albert L. Sturm, *The Procedure of State Constitutional Change, With Special Emphasis on the South and Florida*, 5 FLA. ST. U. L. REV. 569, 574 (1977); Little & Medenblik, *supra* note 27, at 45.

186. N.M. CONST. art. XIX, § 1. *See also* Fischer, *supra* note 174, at 496 n.30.

187. *See supra* part IV.

188. *See Advisory Opinion re Limited Casinos*, 644 So. 2d at 72. The proposal would have allowed the establishment of a limited number of gambling casinos, thereby constitutionalizing the existence of those businesses and requiring further constitutional amendments for the creation of competitor casinos.

189. *See Advisory Opinion - Restricts Laws Related to Discrimination*, 632 So. 2d at 1019.

190. *See* Wyche v. State, 619 So. 2d 231 (Fla. 1993). *See also* Gordon, *supra* note 143, at 974-77.

191. *See* Department of Ins. v. Dade County Consumer Advocate's Office, 492 So. 2d 1032 (Fla. 1986); Stadnik v. Shell's City, Inc., 140 So. 2d 871 (Fla. 1962); Larson v. Lesser, 106 So. 2d 188 (Fla. 1958).

192. *See Dade County Consumer Advocate's Office*, 492 So. 2d at 1034; Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371, 374 (Fla. 1949). *See also* Daniel R. Gordon, *Ecomomic Liberty as the Basis of Social Liberty:* Bowers *Revisited in the Context of State Constitutions*, 19 HASTINGS CONST. L.Q. 1009, 1030-31 (1992).

193. *See supra* part IV.

approved by the Florida Legislature after two consecutive general elections.[194]

Restricting legislative proposals involving human and basic rights strengthens the deliberative quality of Florida republicanism and lawmaking.[195] This proposal has an analog in the Florida constitutional convention process[196] and parallels broad proposals made a decade ago restricting legislatively proposed constitutional amendments.[197] Two successive general elections are required before a constitutional convention can be convened.[198] At the first election, the people of Florida decide whether they desire to call a convention. Two years later, the people of Florida choose their representatives to a constitutional convention.[199] Requiring two elections over a two-year period allows popular passions to cool and encourages less passionate and more thoughtful consideration of the proposed revisions. A similar two-year cooling off period for legislatively proposed amendments involving human and basic rights would encourage a less passionate deliberation process for both the legislature and the people. Nevada also requires two consecutive general elections to pass before any proposed constitutional changes will be approved.[200]

V. CONCLUSION

The 1998 Florida Constitutional Revision Commission faces the challenge of preventing the *Florida Constitution* from becoming a socio-economic status defining junkyard. The Revision Commission must devise the means for preserving the modernity, effectiveness, and flexibility of the 1968 *Florida Constitution.* Restricting the initiative proposal in Florida even further than the current single subject and other requirements would help to preserve the constitution, republicanism, and respect for pluralism and diversity. The Revision Commission should consider placing substantive subject restrictions in the initiative process, requiring super- majorities to approve proposals involving human and basic rights, restricting initiative proposals that involve limited economic or social interests, and requiring that legislatively proposed amendments involving article I be approved by the legislature after two consecutive elections. The Revision Commission

194. *Id.*
195. *See Fine*, 448 So. 2d at 988.
196. FLA. CONST. art. XI, § 4.
197. *See* Little & Medenblik, *supra* note 27, at 44.
198. FLA. CONST. art. XI, § 4(b).
199. *Id.*
200. NEV. CONST. art. 19, § 2(4).

should not fear the novelty of these proposals. Similar proposals have been made before, and a number of states already include similar restrictions in their constitutions. If the Revision Commission still fears such proposals as too novel, the Commission should analyze the purpose of its existence. The Revision Commission itself is a novel approach to amending a state constitution.[201]

201. D'ALEMBERTE, *supra* note 66, at 147.

Labor and Employment Law: Recent Developments—At-Will Termination of Employment Has Not Been Terminated

Joseph Z. Fleming*

TABLE OF CONTENTS

I. INTRODUCTION

According to recent case law and commentary on labor and employment matters, the general concept recognized at common law that employees can be "terminated-at-will" is still recognized today. Employees who are not provided with written agreements setting forth a definite employment term are characterized as employees "terminable-at-will," or "employees-at-will."[1] Under the employment-at-will doctrine, an employer may terminate the employee at any time for good reason, bad reason, or no reason at all.[2]

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1. *See* Dewachter v. Scott, 657 So. 2d 962 (Fla. 4th Dist. Ct. App. 1995).

2. DeMarco v. Publix Super Mkts., Inc., 360 So. 2d 134 (Fla. 3d Dist. Ct. App. 1978), *aff'd*, 384 So. 2d 1253 (Fla. 1980). The court held that "where the term of employment is discretionary with either party or indefinite, then either party for any reason may terminate

The employee also has the opportunity to terminate employment at any time.[3]

The employment-at-will concept was developed under common law. In the 1970s and 1980s, the concept of terminating employees-at-will was rejected in many jurisdictions which felt that the prevailing trend allowed the judiciary to take a second look at common law theories involved in employment law.[4] Courts in such jurisdictions applied more liberal assessment of employee rights.[5] Jurisdictions such as California favored public policy considerations forbidding employees from being terminated-at-will and imposed "just cause" requirements in termination cases. However, even liberal jurisdictions, such as California, restricted their initial inclination to totally abandon the employment-at-will concept. Instead, these jurisdictions modified their public interest concerns and "just cause" concepts.[6]

Florida courts, on the other hand, have been somewhat reluctant to reverse the common law, concluding that it is a process for the legislative and not the judicial branch.[7] However, there have been indications over the past fifteen years that Florida might be moving in a direction perceived by some as a more liberal humanitarian approach.[8]

The experiences of other jurisdictions, the increasing statutory rights afforded to employees in the work place, and reevaluation of public policy considerations all suggest that the employment-at-will doctrine is advantageous—not only for the jurisdiction but the employees in it. Recently, the doctrine has been accepted further through the courts' recognition that the

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it at any time and no action may be maintained for breach of the employment contract." *Id.* at 136.

3. *See* Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994); *Dewachter*, 657 So. 2d at 962; Catania v. Eastern Airlines Inc., 381 So. 2d 265, 266 (Fla. 3d Dist. Ct. App. 1980) (noting that, in Florida, "if the period of employment is indefinite either party may terminate it at any time"); *DeMarco*, 360 So. 2d at 136; Hope v. National Airlines, Inc., 99 So. 2d 244 (Fla. 3d Dist. Ct. App. 1957), *cert. denied*, 102 So. 2d 728 (Fla. 1958).

4. For an interesting overview of the evolution from common law to the more recent decisions which have challenged the utilization of the employment-at-will concept, see WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, EMPLOYMENT TERMINATION RIGHTS AND REMEDIES 342 (1985) [hereinafter HOLLOWAY & LEECH].

5. *See* source cited *supra* note 4.

6. *Cf.* Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722, 728 (Ct. App. 1980) (discussing the implied covenant to use a duty of just cause in termination cases).

7. *See Arrow Air*, 645 So. 2d at 424.

8. *See id.*; *see also* Smith v. Piezo Technology & Professional Adm'rs, 427 So. 2d 182, 185 (Fla. 1983) (Overton, J., concurring) (stating that he would "proceed a step further [than the majority] and establish a common law tort for retaliatory discharge").

employment-at-will doctrine is not only an appropriate continuation of the common law, that should not be abandoned, but also benefits all of the parties concerned.

This article presents an overview of the current status of the employment-at-will doctrine in Florida. Part II provides an analysis of the recent case law interpreting the doctrine. Part III presents commentary on the employment-at-will concept and the discrepancies between the legislative and judicial interpretations of the doctrine.

II. RECENT DEVELOPMENTS IN THE EMPLOYMENT-AT-WILL DOCTRINE

A. *Definition of Employment-At-Will*

In a recent Florida case, *Dewachter v. Scott*,[9] the court identified basic concepts found in employment-at-will contracts.[10] In *Dewachter*, the plaintiff filed suit for breach of contract alleging that her employer induced her to leave full-time employment by orally promising her employment for life or at least until she reached the age of sixty-five. The court held that oral contracts for lifetime employment are terminable-at-will.[11] The court reasoned that absent an employment contract expressly providing for a definite term of employment, the employment is indefinite and, therefore, terminable-at-will by either party.[12]

Under the common law employment-at-will doctrine, which has been supplemented by the *Florida Statutes*, certain statutory rights enable the employee to recover unpaid wages for work performed. Additionally, there are statutory rights which permit employers to place restrictions on subsequent competition in consideration for an employment-at-will contract.[13]

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9. 657 So. 2d 962 (Fla. 4th Dist. Ct. App. 1995).

10. *Id.* at 962-63.

11. *Id.* (citing *Smith*, 427 So. 2d at 182).

12. *Id.* The court also held that even though the plaintiff:

> couched her complaint as fraud in the inducement rather than breach of contract, . . . her claim is still barred as it attempts to circumvent the bar to a breach of contract action based on an oral contract terminable at will. Since the parties clearly cannot be restored to the status quo that existed before the alleged contract, as might be sought in an action based on fraud in the inducement, the measure of damages Dewachter sought here would be the same as breach of contract damages.

Id.

13. FLA. STAT. § 542.33(2)(a) (1993).

These statutes, which also apply to written contracts of employment,[14] clearly expand the benefits and the obligations that relate to employment-at-will situations. For example, under the employment-at-will doctrine, the employee is entitled to receive the appropriate pay for the work that has been performed. The legislature has supplemented common law rights by allowing employees to sue not only for wages, but for unpaid commissions which have been earned and not yet paid. Should the employees prevail, they can also seek statutory attorneys' fees.[15]

In 1994 and 1995, the state courts in Florida reconfirmed the validity of the employment-at-will doctrine as the appropriate rule for judicial interpretation of employee rights. Courts have held that where there are no definite terms of employment, that employment is and should be regarded as "at-will." For example, in *Arrow Air, Inc. v. Walsh*,[16] the Supreme Court of Florida confirmed that employees are terminable "at-will" unless there is a specific statutory provision to the contrary.[17] The court noted that the legislature has the authority to change the employment-at-will concept and can limit the ability of an employer to terminate its employees.[18] *Arrow Air* is significant because the supreme court rejected the lower court's ruling which had enabled a terminated employee to retroactively assert a Whistle-blowing claim[19] before the statute had been enacted.[20]

The Third District Court of Appeal noted that the termination-at-will rule was harsh.[21] In fashioning a judicial interpretation of whether a statutory provision such as the Whistle-blower's Act should be interpreted retroactively, the court found that public policy pervaded the situation.[22] The court found that statutory provisions, whether they were enacted before or after the events in question, suggest a more liberal attitude towards employees.[23] As a result, employees are able to overcome defenses raised

14. *See generally* Sanz v. R.T. Aerospace Corp., 650 So. 2d 1057 (Fla. 3d Dist. Ct. App. 1995).

15. FLA. STAT. § 448.104 (1993). The statute states that "[a] court may award reasonable attorney's fees, court costs, and expenses to the prevailing party." *Id.*

16. 645 So. 2d 422 (Fla. 1994).

17. *Id.* at 424.

18. *Id.*

19. FLA. STAT. § 112.3187 (1993).

20. *Arrow Air*, 645 So. 2d at 425.

21. Walsh v. Arrow Air, Inc., 629 So. 2d 144, 148 (Fla. 3d Dist. Ct. App. 1993), *rev'd*, 645 So. 2d 422 (Fla. 1994).

22. *Id.* at 147.

23. *Id.*

by employers that a statute is inapplicable because the event occurred before the law was enacted.

The Supreme Court of Florida, however, rejected this reasoning, finding the statutes to be prospective only.[24] *Arrow Air* is consistent with other recent Florida cases which found that although the legislature has the ability to change the law so as to preclude employment terminations without meeting or satisfying statutory prerequisites, employees can be terminated for good reason, bad reason, or no reason at all, unless there is a statutory provision to the contrary. As the Third District Court of Appeal noted in *Hartley v. Ocean Reef Club, Inc.*,[25] "[t]he established rule in Florida is that when the term of employment is discretionary or indefinite, either party may terminate the employment at any time for any reason or no reason without assuming any liability."[26]

B. *Statutory Restrictions on Noncompete Agreements*

Courts have refused to uphold claims by employees seeking a continuation of an employment relationship which is terminable-at-will. In addition, courts have refused to enforce oral employment agreements not to be performed within the space of one year. However, an employer does have the ability to enforce an agreement not to compete even in a terminable-at-will situation as long as the restriction on such competition is consistent with the statute of frauds. In other words, the enforcement does not occur for a period of more than one year.

In *Sanz v. R.T. Aerospace Corp.*,[27] the Third District Court of Appeal held that an agreement not to compete entered into by an employee who continued working under an oral agreement was not enforceable because of the statute of frauds.[28] The court refused to extend a written agreement which barred the employee from competing for two years following termination of employment to a subsequent oral agreement.[29] The court noted that:

> Under the statute of frauds, any agreement that is not to be performed within the space of one year from its making must be reduced to

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24. *Arrow Air*, 645 So. 2d at 424-25 (citing Landgraf v. USI Films Prods., 114 S. Ct. 1483 (1994) (applying Title VII prospectively only)).

25. 476 So. 2d 1327 (Fla. 3d Dist. Ct. App. 1985).

26. *Id.* at 1328.

27. 650 So. 2d 1057 (Fla. 3d Dist. Ct. App. 1995).

28. *Id.* at 1060.

29. *Id.* at 1059.

> writing in order to be enforceable. Further, Sanz's continued performance after the expiration of the written agreement pursuant to any oral agreement with R.T.A. cannot serve to remove the agreement from the confines of the statute of frauds. The law is clear that the doctrine of partial performance of an oral agreement has no applicability to personal service contracts.[30]

In addition, the legislature has placed other restrictions on noncompete agreements such as restraining employees from competing when their employer sells the goodwill of the business.[31] However, it is inconsistent to maintain that an employer can terminate an employee in a wrongful manner while, simultaneously, being allowed to enforce a noncompete agreement. Thus, the courts have generally recognized that where there is a noncompete clause preventing the employee from taking advantage of confidential business information, the employer will be prohibited from enforcing that otherwise enforceable covenant after wrongfully discharging the employee.[32]

As William Holloway and Michael Leech note in *Employment Termination Rights and Remedies*:[33]

> The governing principle of contract law is that any material failure of performance by one party that is not justified by the conduct of the other discharges the latter's duty to perform under the contract. Accordingly, if an employer wrongfully discharges the employee prior to expiration of the contract, the employee is relieved from honoring a covenant not to compete. Any other outcome would strip the employee of his ability to earn a livelihood.[34]

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30. *Id.* at 1060 (citations omitted).

31. *See, e.g.*, FLA. STAT. § 542.33(2)(a) (1993); Lovell Farms, Inc. v. Levy, 641 So. 2d 103, 105 (Fla. 3d Dist. Ct. App. 1994) (noting that even if a noncompete agreement were enforceable, a court, before determining that it would grant an injunction to enforce such an agreement, must engage in a balancing test). The court also noted that it must "weigh the public interest, the potential effects on the employee, and the legitimate interests of the employer, to determine the enforceability of the non-compete contract." *Lovell Farms*, 641 So. 2d at 105.

32. *See* HOLLOWAY & LEECH, *supra* note 4, at 409.

33. *Id.*

34. *Id.*

C. *Federal Decisions*

Federal courts that have interpreted Florida law in the past few years have also recognized that employees cannot maintain that they have a public policy right to challenge employment decisions terminating their employment at-will in the absence of a contract or specific statutory right. Moreover, employees cannot raise oral contractual claims that they could only be terminated for cause, or assert that they can contest their termination based on contract claims, when they were employed at-will. For example, the court in *Golden v. Complete Holdings, Inc.*,[35] stated that "the employment-at-will doctrine is the law in Florida."[36] The court stated that: "'[W]here the term of employment is discretionary with either party or indefinite, then either party for any reason may terminate it at any time and no action may be maintained *for breach of employment contract.*'"[37]

Federal courts have also rejected the theory that an employee's retaliatory termination could constitute a tort of retaliatory termination. In *Zombori v. Digital Equipment Corp.*,[38] the court noted:

> Florida's at-will employment doctrine may be "cold-hearted, draconian and out-dated," but it is the law of Florida. Notably, Florida's legislature and courts have created exceptions to the at-will doctrine allowing employees to assert wrongful discharge claims in defined circumstances. By doing so, Florida's legislators and judges have attempted to conform the doctrine to current public policy. Given these officials are elected and appointed by the people of Florida, it is their duty to define Florida law on this and other subjects.
>
> While the Court regularly interprets Florida law to resolve claims in diversity cases, it is not the Court's place to expand Florida's common law by creating new causes of action. Federal courts are entrusted to apply state law, not make it. As of today, Florida does not

35. 818 F. Supp. 1495 (M.D. Fla. 1993) (confirming that an employee can be terminated as an employee-at-will for good reason, bad reason or no reason at all).

36. *Id.* at 1497.

37. *Id.* (quoting DeMarco v. Publix Super Mkts., Inc., 360 So. 2d 134, 136 (Fla. 3d Dist. Ct. App. 1978), *aff'd*, 384 So. 2d 1253 (Fla. 1980)) (alteration in original). The court in *Golden* also noted Florida cases such as *Hartley*, which confirmed that a plaintiff cannot sue based on a type of contract theory. However, the court also noted allegations involving attempts to humiliate the plaintiff into resigning and other misconduct which did not relate to contractual allegations, but rather, to possible tort claims. *Id.* at 1496-99.

38. 878 F. Supp. 207 (N.D. Fla. 1995).

permit employees to sue employers for retaliatory discharge based on a common law prima facie tort theory.[39]

III. A REVIEW OF THE LITERARY COMMENTARY

An increase in conservative philosophy caused a rise in recent analysis of the benefits of the employment-at-will doctrine by commentators. This is due in part because conservative commentators seek to prevent judicially made law from eroding the termination-at-will doctrine. Another reason for the increased analysis may be the numerous legislative humanitarian rights provisions allowing employees to sue their employers. As a result, the factors that caused concern over the employers exploitation of employees and the excessive control employers possessed over the employees have changed. Undoubtedly, the enactment of statutes relating to labor and employment law which give employees more rights to challenge their employers' decisions (especially in the more progressive jurisdictions) has also contributed to the rise in recent commentary. Thus, a review of the basic texts on labor and employment law will illustrate the increase in such laws as well as the decrease in the need to question the employment-at-will doctrine.[40]

Peter Panken, a management labor lawyer, provided an illustration of the availability of employee rights in a fairly liberal jurisdiction, such as New York or California.[41] Panken concluded that "[o]ne act by an employee can give rise to 36 or more causes of action."[42] Panken also noted that if an employer were to "[f]ire a 42-year-old minority woman shop steward with a bad back and 4 years 11 months seniority, [the employer] may face at least *36* different litigations . . . ."[43] Some examples of these include unemployment insurance claims, grievances, and arbitration of grievances under the collective bargaining agreement.[44] Examples of

39. *Id.* at 209-10.

40. *See generally* SECTION OF LABOR & EMPLOYMENT LAW, AMERICAN BAR ASSOCIATION, THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT (Patrick Hardin, et al., eds., 3d ed. 1992 & Raymond L. Wheeler, et al., eds., Supp. 1994); BARBARA LINDEMAN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1982 & David A. Cathcart & R. Lawrence Ashe, Jr., eds., Supp. 1989).

41. Peter M. Panken et al., *Avoiding Employment Litigation: Alternative Dispute Resolution of Employment Disputes in the 90s*, *in* 2 AIRLINE AND RAILROAD LABOR AND EMPLOYMENT LAW 553, 553-54 (ALI-ABA 1994).

42. *Id.* at 553.

43. *Id.*

44. *Id.*

discrimination charges under the Equal Employment Opportunity Commission ("EEOC") include charges complaining of failure to hire, failure to promote, or discharge due to age, sex, race, national origin, and religion.[45]

Despite the expanding statutory remedies, employees still raise alternate theories for recovery when challenging an employer's decision to terminate. This occurs where employees fail to satisfy the statutory prerequisites for jurisdiction over a particular claim, where jurisdiction was satisfied pursuant to pendant jurisdiction, or where various counts where filed to supplement the statutory claims. Often, there are allegations that the employee was improperly terminated because the employer did not have "just cause." Thus, employees argue that the courts should ignore, modify or establish exceptions to the common law rule that employees can be terminated at-will.

However, because of the numerous remedies available to employees, it may be more difficult for courts to reach the conclusion that continuation of the termination-at-will doctrine will result in management abuse. Even in those jurisdictions recognizing the employment-at-will doctrine, there are numerous vehicles which provide protection for employees, and enable employees to challenge employment decisions that are inconsistent with laws

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45. *Id.* The remaining causes of action include:

State (or city) administrative charges of discrimination on the basis of:
(9) Disability; (10) Gender; (11) National origin; (12) Race; and (13) Age;

NLRB charges of:
(14) Discrimination for union activities (exercising § 7 rights to form, join and assist labor organizations) even as the union is charged with (15) Breach of its Duty of Fair Representation;

Federal lawsuits for discrimination on the basis of:
(16) Age (over 40); (17) Race; (18) Sex; (19) National origin; and (20) Disability;

Federal lawsuits on the basis of:
(21) Violation of 42 U.S.C. § 1981; (22) Complicity with union in its violation of its Duty of Fair Representation; and (23) ERISA § 510 lawsuits (termination to avoid obtaining or payment of benefits);

State lawsuits for discrimination on the basis of:
(24) Race; (25) Gender; (26) National Origin; (27) Disability; and (28) Age;

State lawsuits on the basis of:
(29) Wrongful termination for whistleblowing; (30) Discharge for a reasons "against public policy"; (31) Libel; (32) Slander; and when all else fails (33) Intentional; and (34) Negligent infliction of emotional distress as well as (35) Prima Facie tort; and finally (36) Retaliation for filing any of the above charges.

Panken, *supra* note 41, at 553.

protecting employees. For example, these laws include causes of action for discharge due to ethnicity, sex, age, disability, family status, Whistle-blowing activities, and statutes which preclude retaliation because the employee chooses to file suit.[46]

However, these statutory provisions are so extensive that they counter-balance the equities previously used by the courts to evaluate whether the employment-at-will doctrine should be rejected due to the doctrine's unfairness to employees. Courts also have to consider the viability of the historical argument that management has all of the power and control in the work place. Thus, numerous commentators recognize that by undermining the management rights and prerogatives through statutory provisions, the balance has shifted.[47]

In many instances, however, commentators are industry-oriented. As a result, many have relocated to states with a favorable labor climate, such as Florida. These right-to-work jurisdictions are less restrictive and tend to influence commentators' evaluation of the employment-at-will doctrine.[48] In addition, the increase in articulate spokespersons from the conservative "Chicago School" of thought has resulted in a number of publications and texts which document the advantages of the doctrine. One leading proponent for this type of analysis is Richard Epstein, author of *Simple Rules for a Complex World*,[49] who comments extensively on the validity

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46. Examples of statutes providing protection for employees who elect to file a cause of action against their employer for statutory violations include: civil, workers' compensation, and Whistle-blowing statutes.

47. *See* PHILIP K. HOWARD, THE DEATH OF COMMON SENSE 46, 133-44 (1994).

48. *See, e.g.*, David Tuller, *Moviemakers Come to Mainstreet*, N.Y. TIMES, Apr. 27, 1986, at 4. The article notes that California had $4 billion in estimated revenues from motion pictures and featured television production, New York had $1.7 billion, and Florida had $114 million in revenues and was third in national ranking. *Id.* The article further notes that the "action" is not just in California and New York because the other 48 states are wooing and winning film producers as well. In addition to state underwriting of expenses, the article concludes that another advantage to operating in states other than New York and California relates to lower labor costs because "[l]abor costs in right-to-work states like Florida, North Carolina, and Texas can be as much as 25 percent lower than those in New York." *Id.* Since employers in most cases are the ones that determine whether they are going to operate in a state, this right-to-work provision creates an initial attraction. This ultimately increases motion picture productions in these right-to-work states by assisting employers. Even employees and unions may benefit by virtue of increased work, although unions constantly press to eliminate the right to work provisions and do not agree with the management approach that there are advantages for a state to exercise its right to work option. *Id.*

49. RICHARD EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).

of the "contract at will."[50] Epstein notes that there are advantages for a "contract at will." Such a contract is basically terminable-at-will, and as such:

> provides both sides with a *secured obligation.* The point sounds strange given that one side can quit and the other side can fire, without any explanation. For most people, the idea of security connotes a mortgage or a lien on some form of property — the home mortgage is perhaps the most familiar example. But it is appropriate to expand our horizons on this point. The employer who decides to fire a worker has to pay a price, that is, he will no longer be able to reap the benefits of the worker's labor. Conversely, the worker who decides to quit will no longer be able to command the wage. Each obligation is held hostage to the other. Before quitting or firing, one has to make a hard decision about whether the benefit forgone is worth the labor or the wages that can now be retained. But once a decision to sever the arrangement is made, the security on the other side is instantly realized, without the formalities and delay of foreclosure proceedings. The worker instantly recovers her labor, and the employer his cash. Knowing the efficiency of the security arrangement, people will move with caution, given that it is always costly to exercise the right to quit or to fire.[51]

In addition, Epstein notes that the right to quit, or to fire, created by the termination-at-will doctrine has "powerful and desirable incentive effects. In particular, it serves as an effective check against the advantage-taking open to either side in a continuous relationship."[52] Epstein notes additional advantages to the doctrine such as "moderating" influences which tend to prevent either party from obtaining an advantage over the other, and the "durability" of the doctrine due to its "fragile" legal nature.[53] Because either party can terminate the employment at any time, a fragile employment relationship results. This relationship is thus strengthened, and hence durable, because the parties are not required to enter into long-term agreements which often cause additional demands and disputes over the employment terms. Epstein argues further that "[t]he utility of the contract at will is also strengthened by reputational forces. The employer with a large work force is constrained in dealing with any particular employee. Firing the first worker for reasons that other workers perceive as unfair will

50. *Id.* at 156-59.
51. *Id.* at 157-58.
52. *Id.* at 158.
53. *Id.*

have powerful ripple effects throughout the firm."[54] In concluding, Epstein suggests that the "ease of its enforcement" is a final major advantage of the termination-at-will doctrine.[55] The author states that:

> The legal position is this: I quit, or you fire me; judgment for the defendant. The entire system takes about two words to explicate in the standard case. "Anything goes" within the legal system precisely because anything will not go in the business setting. Simplicity has its dividends, for both sides can share in the administrative savings in the form of higher profits and higher wages. Only the lawyers lose when the contract at will is fully respected.[56]

IV. INCONSISTENCIES BETWEEN LEGISLATIVE AND JUDICIAL INTERPRETATION

It has been suggested that the statutory provisions are inconsistent because they allow an employee who was terminated for exercising a workers' compensation claim to be able to obtain reinstatement of that employment, while not extending similar protection to all employees in Florida.[57] This statutory right permitting an employee to return to work effectively eliminates the termination-at-will concept. However, statutory provisions reflect important for public policy reasons. As a result, they do not permit the same right to be asserted in other situations such as to prevent a retaliatory firing of a employee at-will. The difference is due to the legislative intent of a particular provision of the statute. Such legislative intent has been articulated in the workers' compensation and Whistle-blowing statutory provisions.

In these situations, the legislature reached conclusions resulting in legislative provisions which changed the relationship between the parties in the employment field by designating certain conduct as protected, and thus, precluding termination because of it. The distinction between the statutory provisions and the ability of courts to legislate policies through judicial

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54. EPSTEIN, *supra* note 49, at 158.

55. *Id.* at 159.

56. *Id.*

57. *See, e.g.*, Stephen G. DeNigris, *The Public Policy Exception: The Need to Reform Florida's At-Will Employment Doctrine After* Jarvinen v. HCA Allied Clinical Laboratories *and* Bellamy v. Holcomb, 16 NOVA L. REV. 1079 (1992) (arguing that conservative jurisprudence notwithstanding, the termination-at-will doctrine should be abandoned or reformed); Mark E. Walker, Comment, *Workers' Compensation: Florida's Resistance to Nonstatutory Limits to the Employment-At-Will Doctrine*, 43 FLA. L. REV. 583 (1991).

decisions is the difference which the courts have recognized, and utilized, in their decisions not to strike down the termination-at-will concept.

As recent decisions have indicated, the increase in statutory provisions also makes it very difficult for the judiciary to formulate public policy arguments to undermine or eliminate the employment-at-will doctrine. Difficulties exist not only because of the complexity of laws but because of the inconsistencies in the statutory provisions. Additional inconsistencies result where judges attempt to fashion a common law remedy which is precluded under the statutory provisions. One example of this problem is found where the inconsistencies in federal statutory provisions have caused litigants to seek judicial resolution of the inconsistencies. For example, in *Sears, Roebuck & Co. v. Attorney General of the United States*,[58] the employer sought declaratory and injunctive relief to eliminate conflicting legislative mandates and to "coordinate its equal opportunity laws."[59] The opinion provided the employer's arguments:

> [S]ocial attitudes, economic realities and earlier government policies — specifically veterans preference schemes — combined to produce a business environment in which most of the responsible and remunerative posts were occupied by white males. Sears complains that these previously established priorities in employment conflict with subsequently established priorities in employment.
>
> . . . .
>
> In the second part of the complaint, Sears attempts to attribute the alleged shortage of well-qualified female and minority applicants to the government's failure to enforce equal opportunity laws in housing, education and employment.[60]

Despite such allegations, the United States District Court for the District of Columbia ruled that the judiciary could not resolve inconsistencies in federal legislation because of Article III of the Constitution which prohibits the resolution of matters that do not involve an actual case or controversy.[61] The court ruled that "'a controversy in [the Article III] sense involves considerably more than mere abstract philosophical disagree-

58. 19 Fair Empl. Prac. Cas. (BNA) 916 (D.D.C. 1979).
59. *Id.* at 916.
60. *Id.* at 917.
61. *Id.* (discussing U.S. CONST. art. III).

ment with the wisdom, propriety, or desirability of specific governmental activities . . . .'"[62]

In addition to the statutory inconsistency problem, there are also problems with statutory provisions that preclude a judicially mandated "just cause" standard. For example, in *McKennon v. Nashville Banner Publishing Co.*,[63] an employee was discharged due to age in violation of the Age Discrimination in Employment Act ("ADEA"). The employer subsequently discovered that the employee was guilty of misconduct that would have supported the termination had the employer been aware of the conduct at the time. The court held that although an employer may possess after acquired evidence that would give him just cause to discharge the employee, the employer is precluded from doing so because of an express statutory provision to the contrary.[64] In other words, although courts might conclude that the employee could have been terminated because of the employee's improper conduct, the statutory policy, which favors relief for the employee, may override and excuse the misconduct.[65] As a result, just cause to terminate an employee cannot be the sole standard applied in evaluating whether the employment decision complained of by the employee was proper.

A judicial body of law, which undermines the employment-at-will doctrine and requires the establishment of the "just cause" standard for termination, may not answer the question of whether the statutory prerequisites have been complied with for the purpose of protecting statutory rights. Federal statutory rights may preclude the need to evaluate a state common law system which uses "just cause" because even establishing such a standard would not resolve the question of whether a federal statute had been violated.

In the same sense, Florida courts interpreting Florida statutes will also have to evaluate the prerequisites for statutory protection. For example, an employee who satisfied the requisites for suing under the Whistle-blowing provisions[66] of the *Florida Statutes* might have acted in a manner that would justify the employee's termination under a judicially created "just cause" standard. However, if the employee establishes that the employee was also terminated because of retaliation for Whistle-blowing activity,

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62. *Id.* (quoting Gaillot v. Dep't of Health, Educ. & Welfare, 464 F.2d 598 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972)) (alteration in original).

63. 115 S. Ct. 879 (1993).

64. *Id.* at 883-84.

65. *Id.*

66. FLA. STAT. §§ 448.101(5), .102 (Supp. 1994).

which is protected under the statute, further judicial proceedings would be required.

Thus, balancing the inconsistencies in the federal and state statutory provisions and adding the fact that statutory provisions take precedence over the common law issues may further reduce the reasons for the courts to undermine the termination-at-will doctrine. On the other hand, it is equally argued that courts can create a common law doctrine and should not be dissuaded from doing so merely because, in certain cases, that doctrine may be eliminated by statutory provisions. However, the courts would then be faced with the proposition that the legislature has not yet eliminated the termination-at-will doctrine in enacting various additional employment rights. Thus, adding judicial modifications to the common law that conflict with existing and expanding statutory provisions might be counterproductive.

V. CONCLUSION

It appears that conservative commentators now suggest additional policy reasons for the continuation of the employment-at-will doctrine. Moreover, the liberal commentaries, which are now decreasing, have also conceded that more judges are now deferring to the legislature. Thus, the question to be resolved in future years is whether a retreat from complex employment rights created by statutory laws would cause a resurgence of judicial opinions evaluating the employment-at-will doctrine. At this point, however, the legislature has not decreased the rights and protections afforded employees. Notwithstanding the conservative commentary and plentiful rhetoric in both federal and state legislative bodies, there does not appear to be a retreat from employment regulation in the work place by virtue of state and federal laws. For this reason, the recent decisions which have sustained the doctrine of employment-at-will in view of increasing statutory labor and civil rights laws, appear to demonstrate a trend which will continue. Based upon recent judicial rulings and trends, it appears that the employment-at-will doctrine will be with us for some time to come.

Medical Malpractice: A Review of the Presuit Screening Provisions of the Florida Medical Malpractice Act

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TABLE OF CONTENTS

I. INTRODUCTION

In 1985, the Florida Legislature recognized that there was an ongoing "insurance crisis." Accordingly, the Comprehensive Medical Malpractice Reform Act of 1985 ("Act") was enacted for the purpose of ensuring that

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the citizens of Florida have available competent and reasonably priced medical services.[1] The legislation intended to ease the threat to the continued availability of high quality care caused by escalating premium costs for professional liability insurance.[2] The Act requires a medical malpractice plaintiff to put a prospective defendant on notice that a suit asserting professional negligence will be filed against the defendant.[3] The notice of intent is a condition precedent to the filing of a lawsuit.[4] This requirement, along with others in the statute, ostensibly promotes settlement of medical malpractice claims and consequently reduces the overall societal cost of health care.

This article is a detailed analysis of the presuit discovery provisions of the Comprehensive Medical Malpractice Reform Act of 1985 and the interpretation and application of the Act by Florida courts. This analysis provides a procedural guidance for practitioners to anticipate how courts may interpret the provisions of the statute in particular cases.

II. STATUTORY REQUIREMENTS

A. *The Notice of Intent to Initiate Litigation*

The Act applies to those causes of action filed after October 1, 1985[5] and requires a claimant to send to prospective defendants a formal, written "notice of intent to initiate litigation" advising them that a suit will be filed against them.[6] As an additional requirement, the notice of intent must be accompanied by a verified, written opinion of a medical expert.[7] The notice of intent is a condition precedent to the institution of a claim.[8] A copy of the notice of intent must be furnished to the Department of Business

1. Comprehensive Medical Malpractice Reform Act of 1985, ch. 85-175, 1985 Fla. Laws 1183 (codified at FLA. STAT. § 766.106 (1985)). In 1988, the Florida Legislature enacted § 766.201 through § 766.212. Ch. 88-1, §§ 48-59, 1988 Fla. Laws 119, 164-73. That same year, the legislature strengthened § 766.106 of the *Florida Statutes*. *See* 1988 Fla. Laws ch. 88-173; 1988 Fla. Laws ch. 88-277. The changes were enacted with the stated intent of providing a plan for the prompt resolution of medical malpractice claims.

2. Ch. 85-175, 1985 Fla. Laws at 1183.

3. FLA. STAT. § 766.106(2) (Supp. 1994).

4. *Id.*; Hospital Corp. of Am. v. Lindberg, 571 So. 2d 446, 448 (Fla. 1990); Pearlstein v. Malunney, 500 So. 2d 585, 586 (Fla. 2d Dist. Ct. App. 1986).

5. FLA. STAT. § 766.106(13) (Supp. 1994).

6. *Id.* § 766.106(2).

7. *Id.* § 766.203(2) (1993).

8. *Id.* § 766.106(2) (Supp. 1994); *see also* Patry v. Capps, 633 So. 2d 9, 11 (Fla. 1994); Williams v. Campagnulo, 588 So. 2d 982, 983 (Fla. 1991).

and Professional Regulation and must include the full name and address of the claimant and any prospective defendants who are health care providers licensed under chapters 458, 459, 460, 461, or 466 of the *Florida Statutes*.[9] The notice must also include the "date and a summary of the occurrence giving rise to the claim[ ] and a description of the injury to the claimant."[10] Once notice has been given, the claimant cannot file suit for ninety days.[11] The purpose of this ninety-day period is to toll the statute of limitations as to all properly notified defendants.[12] Ninety days after the defendant receives the notice of intent letter, the plaintiff may file suit, and has either sixty days or the remainder of the time left under the statute of limitations to file suit, whichever is greater.[13]

B. *Presuit Investigation by the Parties*

Once the prospective defendant receives the notice, the defendant's insurer or self-insurer must review and evaluate the claim utilizing one of the several methods set forth in the statute.[14] Both the claimant and the prospective defendant are required to cooperate with the insurer during this evaluation process.[15] Furthermore, the claimant may be required to appear before a screening panel or medical review committee, or submit to a physical examination.[16] If a party unreasonably fails to comply with this section, the court is justified in dismissing the claims or defenses.[17]

Sometime before the end of the ninety-day period, the insurer or self-insurer must serve the claimant with a response either admitting liability, rejecting the claim, or offering a settlement.[18] This response must then be evaluated by the claimant's attorney who must utilize the procedures set forth in the statute.[19] Should the recipient of a notice letter respond by denying liability, the denial letter must be accompanied by a verified written medical expert opinion.[20]

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9. FLA. STAT. § 766.106(2) (Supp. 1994).
10. *Id.*
11. *Id.* § 766.106(3)(a).
12. *Id.* § 766.106(4).
13. *Id.*; Boyd v. Becker, 627 So. 2d 481, 482 (Fla. 1993); Tanner v. Hartog, 618 So. 2d 177, 182-84 (Fla. 1993).
14. FLA. STAT. § 766.106(3)(a) (Supp. 1994); *Boyd*, 627 So. 2d at 484.
15. FLA. STAT. § 766.106(3)(a) (Supp. 1994).
16. *Id.*
17. *Id.*
18. *Id.* § 766.106(3)(b).
19. *Id.* § 766.106(3)(d).
20. FLA. STAT. § 766.203(3)(b) (1993).

C. *Presuit Investigation by the Court*

1. Dismissal of the Claims and Defenses

The statute permits the court, upon a request by any party, "to determine whether the opposing party's claim or denial rests on a reasonable basis."[21] Section 766.206(2) clearly states that if:

> the notice of intent to initiate litigation mailed by the claimant is not in compliance with the . . . requirements of [the statute], the court shall dismiss the claim, and the person who mailed [the defective] notice of intent, whether the claimant or the claimant's attorney, shall be *personally* liable for all attorney's fees and costs incurred during the investigation and evaluation of the claim.[22]

Similarly, if the court finds that the defendant's response rejecting the claim fails to comply with the reasonable investigation requirements, the court must strike the defendant's response.[23] Thus, the person who mailed the defective response, whether the defendant or the defendant's insurer or attorney, will be held *personally* liable for all attorney's fees and costs.[24]

2. Disciplinary Action

In addition to dismissal of the claim or defense, noncompliance with the statute could result in the matter being submitted to the Florida Bar for disciplinary review. For example, section 766.206(4) provides that if the court finds that an attorney for the claimant mailed a notice of intent without a reasonable investigation, that the attorney filed a medical negligence claim without first mailing the proper notice of intent, or that the defendant's attorney mailed a response rejecting the claim without a reasonable investigation, the court must submit its findings in the matter to the Florida Bar for disciplinary review.[25] Any attorney reported to the Florida Bar three or more times within a five-year period must be reported to a circuit grievance committee acting under the jurisdiction of the Supreme Court of Florida.[26]

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21. *Id.* § 766.206(1).

22. *Id.* § 766.206(2) (emphasis added). These fees and costs include those incurred by the defendant and the defendant's insurer. *Id.*

23. *Id.* § 766.206(3).

24. FLA. STAT. § 766.206(3) (1993).

25. *Id.* § 766.206(4).

26. *Id.*

If the grievance committee finds probable cause to believe that an attorney has violated the presuit investigation requirements, the committee must forward a copy of its findings to the Supreme Court of Florida for review.[27]

The expert who provided the corroborating medical opinion may also be subjected to disciplinary action. The statute provides that if the court finds that the corroborating written medical expert opinion attached to any notice of intent, or to any response rejecting a claim was not based upon reasonable investigation, the court must report the expert to the Division of Medical Quality Assurance.[28] Section 766.206(5)(b) permits the court to refuse to consider the testimony of any expert who has been disqualified three times pursuant to this section.[29]

III. FLORIDA CASE LAW

A. *Presuit Requirements*

There are a number of Florida cases construing the above-mentioned requirements. *Public Health Trust v. Knuck*[30] is the first Florida case that interpreted the Comprehensive Medical Malpractice Reform Act of 1985. In *Knuck*, Blanche Freundlich filed a medical malpractice suit against various defendants, including Public Health Trust of Dade County and Dr. Peritz Scheinberg. The suit was filed on February 10, 1986 as a consequence of allegedly negligent medical care rendered on February 16, 1984. Although Freundlich had provided notice to the hospital prior to filing suit, she failed to give notice to the University of Miami and Dr. Scheinberg. The defendants moved to dismiss the complaint because Freundlich failed to serve the requisite notice of intent to initiate medical malpractice litigation on the University of Miami and Dr. Scheinberg during the

27. *Id.*

28. *Id.* § 766.206(5)(a).

29. FLA. STAT. § 766.206(5)(b) (1993); *see* Faber v. Wrobel, 20 Fla. L. Weekly D1730, D1731 (2d Dist. Ct. App. July 28, 1995) (stating that the standard for disqualification of medical experts is less stringent than the standard for the qualifications required to offer expert testimony at trial). *But see* Winson v. Norman, 658 So. 2d 625, 626 (Fla. 3d Dist. Ct. App. 1995) (holding that a doctor who has not been engaged in the actual practice of medicine for more than ten years and who has limited his professional activities to acting as a professional "litigation expert" was *not* a medical expert qualified to execute a verified medical opinion affidavit as required by the statute).

30. 495 So. 2d 834 (Fla. 3d Dist. Ct. App. 1986).

applicable statute of limitations period.[31] In addition, the plaintiff failed to observe the mandatory ninety-day presuit screening period prior to filing suit,[32] and failed to plead the good faith certificate alleging compliance with statutory requirements.[33]

At the hearing on the motion to dismiss, the plaintiff argued that the filing of the complaint tolled the statute of limitations and requested that the trial court abate the action pending compliance with the neglected statutory requirements. The trial court granted the plaintiff's motion to abate the action pending the necessary compliance with the statute.[34] The defendants filed a petition for writ of prohibition, asking the Third District Court of Appeal to preclude the trial court from reviving the abated action.[35]

The Third District Court of Appeal granted the writ and prohibited the trial court from reviving the action against the University of Miami and Dr. Scheinberg.[36] The court held that the applicable statute of limitations was not tolled because of the plaintiff's failure to serve a notice of intent to initiate litigation according to section 768.57(2) of the *Florida Statutes*.[37] The court denied the writ against Jackson Memorial Hospital since that defendant had received the required notice within the applicable statute of limitations period.[38]

For guidance, the court turned to cases interpreting section 768.28(6), which deals with notice requirements in sovereign immunity cases.[39] The court stated that because the notice of intent to initiate litigation had not been served, the statute of limitations had not been tolled; thus, the limitation period expired soon after the complaint was filed.[40] The court concluded that the statutory period expired before the required notice of intent had been given to the University of Miami and Dr. Scheinberg, and thus, the trial court erred in abating the action as to those defendants.[41]

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31. *Id.* at 835 (citing FLA. STAT. § 768.57(2) (1985)). Under the applicable statute of limitations, an action in negligence must be commenced within four years from the date of the injury. FLA. STAT. § 95.11(4)(b) (1993).

32. *Knuck*, 495 So. 2d at 835 (citing FLA. STAT. § 768.57(3)(a) (1985)).

33. *Id.* (citing FLA. STAT. § 768.495 (1985)).

34. *Id.* at 836.

35. *Id.*

36. *Id.* at 837.

37. *Knuck*, 495 So. 2d at 837.

38. *Id.*

39. *Id.* at 836.

40. *Id.* at 837.

41. *Id.*

The court expressly rejected Freundlich's argument that the notice sent to Jackson Memorial Hospital sufficed as notice to all defendants.[42]

The *Knuck* decision was followed by the Second District Court of Appeal in *Pearlstein v. Malunney*[43] and was cited with approval in *Lynn v. Miller*.[44] In *Pearlstein*, the plaintiff filed a medical malpractice action without complying with the statutory notice provisions of section 768.57 of the *Florida Statutes*.[45] As a result, the defendants filed a motion to dismiss based upon the plaintiff's failure to comply with the mandatory requirements of the statute. The trial court denied the motion, holding that section 768.57 unreasonably discriminates against medical malpractice litigants, deprives litigants of their constitutional right of access to the courts, and is unconstitutionally vague.[46] The trial court ruled that the complaint itself satisfied the notice requirements of the statute and directed the defendants to file an answer to the complaint.[47] The defendants subsequently sought a writ of certiorari in the Second District Court of Appeal.

The Second District Court of Appeal upheld the constitutionality of the prefiling notice requirements.[48] The court recognized that the Act was enacted in response to a perceived crisis in the availability of reasonably priced health care services due to escalating medical malpractice insurance premiums.[49] Further, the court found that a valid legislative purpose exists in ensuring the protection of public health by assuring the availability of adequate medical care.[50] Thus, the district court quashed that portion of the trial court's ruling which directed the defendants to answer the complaint.[51] The court indicated that the notice requirement is a condition precedent to filing suit and held that a complaint filed without notice is "for all intents and purposes, a nonexistent lawsuit."[52]

In *Lynn v. Miller*,[53] the court reiterated that compliance with the requirements of section 768.57 is a condition precedent to maintaining a suit

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42. *Knuck*, 495 So. 2d at 837.
43. 500 So. 2d 585 (Fla. 2d Dist. Ct. App. 1986), *review denied*, 511 So. 2d 299 (Fla. 1987).
44. 498 So. 2d 1011 (Fla. 2d Dist. Ct. App. 1986).
45. *Pearlstein*, 500 So. 2d at 586.
46. *Id.*
47. *Id.* at 586-87.
48. *Id.* at 587.
49. *Id.* at 586.
50. *Pearlstein*, 500 So. 2d at 586.
51. *Id.* at 587.
52. *Id.*
53. 498 So. 2d 1011 (Fla. 2d Dist. Ct. App. 1986).

which must be satisfied within the applicable statute of limitations period.[54] The court explained that if the limitations period has run, a trial court lacks the authority to abate a premature complaint even if, but for the prefiling notice requirements, the complaint would have been timely filed.[55]

The Second District Court of Appeal, however, found that the commencement of a malpractice suit must be distinguished from the existence of a cause of action. For example, in *Malunney v. Pearlstein*,[56] the court found that the purpose of section 768.57 is wholly procedural because it provides potential defendants "with an opportunity to resolve amicably the controversy without the burden of a lawsuit."[57] The court held that section 768.57 has no effect upon the continuing existence of a cause of action.[58] Accordingly, where the initial complaint is dismissed because the plaintiff fails to allege that a notice of intent to initiate litigation was sent to potential defendants, the filing of a new lawsuit properly alleging notice will not be barred by the doctrine of res judicata.[59]

There are a number of other significant cases addressing the required statutory notice. For example, in *Glineck v. Lentz*,[60] the court held that oral notice of intent to initiate medical malpractice litigation is insufficient compliance with the statute.[61] In *Wilkenson v. Golden*,[62] the court held that a patient's letter to a dentist's insurance carrier did not constitute a "notice of intent" where the letter was not sent by certified mail, nor was it accompanied by a corroborating medical report.[63] The statute does not allow for constructive notice, oral notice, or notice by publication.[64] However, there is no need to give a separate notice of intent to a physician by a spouse of the injured person in a loss of consortium claim.[65] This is

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54. *Id.* at 1012.

55. *Id.*

56. 539 So. 2d 493 (Fla. 2d Dist. Ct. App. 1989).

57. *Id.* at 495; *see also* Castro v. Davis, 527 So. 2d 250, 251 (Fla. 2d Dist. Ct. App. 1988).

58. *Malunney*, 539 So. 2d at 496.

59. *Id.* at 495.

60. 524 So. 2d 458 (Fla. 5th Dist. Ct. App.), *review denied*, 534 So. 2d 399 (Fla. 1988).

61. *Id.* at 458.

62. 630 So. 2d 1238 (Fla. 2d Dist. Ct. App. 1994).

63. *Id.* at 1241.

64. FLA. STAT. § 766.106 (Supp. 1994); *see* Ingersoll v. Hoffman, 561 So. 2d 324, 325 (Fla. 3d Dist. Ct. App. 1990), *quashed on other grounds*, 589 So. 2d 223 (Fla. 1991).

65. Chandler v. Novak, 596 So. 2d 749, 751 (Fla. 3d Dist. Ct. App. 1992). *But see* Scarlett v. Public Health Trust, 584 So. 2d 75, 75 (Fla. 3d Dist. Ct. App. 1991) (dismissing the spouse's claim for loss of consortium because the notice only referred to one spouse), *overruled sub nom. Chandler*, 596 So. 2d at 750.

because a derivative action is not a separate and distinct action; it is completely dependent upon the original action filed by the injured spouse.

In *Solimando v. International Medical Centers*,[66] the Second District Court of Appeal addressed the issue of whether a notice of intent sent by regular United States mail, rather than the statutorily specified certified mail, sufficiently complied with the Act. The plaintiff had filed a medical malpractice suit against a number of health care providers. However, the plaintiff's attorney sent the notice of intent to initiate litigation by regular mail rather than by certified mail. As a result, the defendants filed a motion to dismiss the complaint on the ground that the court lacked subject matter jurisdiction. They argued that the plaintiff failed to comply with the mailing provisions of sections 768.57(2) and 768.57(3)(a) which require that the notice of intent be sent by certified mail.[67]

At the hearing on the motion to dismiss, the plaintiff argued that some of the health care providers waived the statutory requirements that the notice be sent by certified mail because the insurance carriers of the health care providers acknowledged receipt of the notice. Furthermore, the carriers had responded with letters indicating that they were reviewing the case to determine whether there was any liability. Thus, the plaintiff argued that the defendants should be estopped from asserting that notice sent by regular mail is insufficient. Although the trial court did not address the issue of waiver or estoppel, it ruled that the court did not have jurisdiction to hear the case.[68] The court only had jurisdiction to grant the motion to dismiss for lack of subject matter jurisdiction due to the plaintiff's failure to comply with the procedure for mailing notice.[69]

On appeal, the Second District Court of Appeal rejected the trial court's ruling in holding that the notice requirements are not jurisdictional and are subject to waiver.[70] The court indicated that the failure to comply with the prelitigation notice requirements of section 768.57 does not deprive the trial court of subject matter jurisdiction.[71] Thus, trial courts may consider the principles of estoppel and waiver in deciding whether to excuse a party for noncompliance.[72] Nevertheless, the court did warn that it is essential for the

66. 544 So. 2d 1031 (Fla. 2d Dist. Ct. App.), *review denied*, 549 So. 2d 1013 (Fla. 1989).

67. *Id.* at 1032.

68. *Id.*

69. *Id.*

70. *Id.* at 1033-34.

71. *Solimando*, 544 So. 2d at 1034-35.

72. *Id.* at 1035.

complaint to allege compliance with the statute.[73] However, in recognizing the difficulty facing a plaintiff who may not be able to frame a complaint invoking the jurisdiction of the court, the court adopted and approved the view that a complaint setting forth factual allegations concerning waiver of the notice requirements of section 768.28(6) satisfies the presuit notice requirements of the statute.[74] Accordingly, a medical malpractice plaintiff's failure to comply with pre-litigation notice requirements does not necessarily deprive a trial court of subject matter jurisdiction. Furthermore, a trial judge may consider principles of estoppel and waiver in deciding whether to excuse the plaintiff for noncompliance.[75]

B. *Amending the Complaint*

The issue of whether a trial court in a medical malpractice action could permit amendment of a complaint so as to allege compliance with the presuit requirements was first addressed in *Lindberg v. Hospital Corp.*[76] In *Lindberg*, the plaintiffs, Kurt and Mary Lindberg, filed a medical malpractice action on April 4, 1986 against the Hospital Corporation of America, Dr. Jamie Alalu, Dr. Robert Liem, and Dr. Bernard Cheong, alleging negligent care and treatment of Kurt Lindberg in April and May of 1984. On the same day the complaint was filed, the plaintiffs sent notices of intent to initiate litigation to each defendant by certified mail. The defendants, however, filed a motion to dismiss the plaintiffs' complaint because the plaintiffs failed to comply with conditions precedent to filing a complaint. Specifically, the defendants alleged that the plaintiffs failed to notify the defendants of their intent to sue within the statute of limitations period. The motion alleged further that the plaintiffs' failure divested the court of its subject matter jurisdiction to hear the case, thus requiring dismissal.[77] At the hearing on the defendants' motion to dismiss, the plaintiffs requested leave to amend their complaint to allege that the notice requirement had been satisfied. The trial court dismissed the cause of action, and refused to grant the plaintiffs' leave to amend.[78] The plaintiffs appealed.

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73. *Id.*

74. *Id.* (citing Bryant v. Duval County Hosp. Auth., 502 So. 2d 459, 462-63 (Fla. 1st Dist. Ct. App. 1986), *review denied*, 511 So. 2d 998 (Fla. 1987)).

75. *Bryant*, 502 So. 2d at 462.

76. 545 So. 2d 1384 (Fla. 4th Dist. Ct. App. 1989).

77. *Id.* at 1384-85.

78. *Id.* at 1385.

In reversing the trial court's dismissal of the complaint, the Fourth District Court of Appeal held that the statute of limitations had been tolled because notice had been given within the statutory period.[79] Thus, the trial court should have permitted the plaintiff to amend the complaint so as to allege compliance with the statutory prerequisites.[80]

In reaching this conclusion, the court relied on *Holding Electric, Inc. v. Roberts*,[81] which held that under section 713.06(3)(d)(1), delivery of a contractor's affidavit is not jurisdictional, although it is a prerequisite to maintaining the action and must be completed within the statutory limitation period.[82] Therefore, the trial court has authority to allow the plaintiffs to amend the complaint provided that the notice is given within the appropriate statute of limitations period.[83] However, because the Fourth District Court of Appeal acknowledged that its holding directly conflicts with *Pearlstein*[84] and *Malunney*[85] it certified the following question to the Supreme Court of Florida:

> IS THE FAILURE TO FOLLOW THE PRE-SUIT SCREENING PROCESS OF SECTION 768.57, FLORIDA STATUTES, A FATAL JURISDICTIONAL DEFECT OR MAY IT BE CORRECTED BY FOLLOWING THE PROCEDURE SUBSEQUENT TO FILING THE COMPLAINT SO LONG AS THE NOTICE OF INTENT TO LITIGATE IS SERVED WITHIN THE STATUTORY LIMITATIONS PERIOD?[86]

The supreme court answered the certified question in *Hospital Corp. of America v. Lindberg*.[87] The court held that "in medical malpractice actions, if a presuit notice is served at the same time [the] complaint is filed, the complaint is subject to dismissal with leave to amend."[88] The court held further that "[t]he plaintiff may subsequently file an amended complaint asserting compliance with the presuit notice and screening requirements of

79. *Id.* at 1388.
80. *Id.*
81. 530 So. 2d 301 (Fla. 1988).
82. *Lindberg*, 545 So. 2d at 1388 (citing *Roberts*, 530 So. 2d at 303).
83. *Id.*
84. 500 So. 2d 585 (Fla. 2d Dist. Ct. App. 1986), *review denied*, 511 So. 2d 299 (Fla. 1987).
85. 539 So. 2d 493 (Fla. 2d Dist. Ct. App.), *review denied*, 547 So. 2d 1210 (Fla. 1989).
86. *Lindberg*, 545 So. 2d at 1388.
87. 571 So. 2d 446 (Fla. 1990).
88. *Id.* at 449.

section 768.57 and the presuit investigation and certification requirements of section 768.495(1)."[89] However, practitioners in the field of medical malpractice should note that failure to timely file the presuit notice within the statute of limitations period will require dismissal of the complaint.[90]

In *Southern Neurosurgical Associates, P.A., v. Fine*,[91] the court held that where the limitation period has not yet run, a presuit notice served simultaneously with the filing of the complaint will cause the complaint to be dismissed with leave to amend.[92] The plaintiff may then file an amended complaint alleging compliance with presuit notice and screening requirements.[93] However, if the statutory period for initiating the suit has run before the plaintiff satisfies the presuit notice or screening requirements, the trial court will be divested of subject matter jurisdiction.[94]

C. *The Mode of Service*

The Supreme Court of Florida, in *Patry v. Capps*,[95] answered a certified question regarding whether the certified mail requirement for the notice of intent letter is a substantive element of the statute or a procedural one which can be disregarded by the trial court once the defendant receives actual written notice in a timely manner that does not result in any prejudice.[96] In *Patry*, a medical malpractice action was filed against Dr. William Capps for negligence in delivering the Patrys' child by caesarean section. The trial court dismissed the action because the plaintiffs failed to comply with the mode of service required in the statutes.[97] Dr. Capps was served with the Patrys' intent to initiate litigation by hand delivery rather than by certified mail. The district court relied on *Solimando* and *Glineck* in affirming the trial court's dismissal.[98]

In deciding whether strict compliance with the mode of service is mandated, the Supreme Court of Florida reviewed the purpose behind the

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89. *Id.*

90. *See* Miami Physical Therapy Assocs. v. Savage, 632 So. 2d 114 (Fla. 3d Dist. Ct. App. 1994).

91. 591 So. 2d 252 (Fla. 4th Dist. Ct. App. 1991).

92. *Id.* at 254-55.

93. *Id.* at 255.

94. *Id.*; *see also* Berry v. Orr, 537 So. 2d 1014, 1015 (Fla. 3d Dist. Ct. App. 1988), *review denied*, 545 So. 2d 1368 (Fla. 1989).

95. 633 So. 2d 9 (Fla. 1994).

96. *Id.* at 10.

97. *Id.*

98. *Id.* at 13.

legislation.[99] The court recognized that the purpose of the Act is to promote the resolution of medical malpractice claims early in the claim process so as to avoid a full, adversarial proceeding.[100] The court concluded that the statutory requirements regarding the mode of service were "merely a technical matter of form that was designed to facilitate the orderly and prompt conduct of the screening and settlement process by establishing a method for verifying significant dates in the process."[101] In this case, because Dr. Capps acknowledged timely receipt of the written notice and was not prejudiced by the method of delivery, the supreme court held that strict compliance with the statute was not required.[102] However, the court emphasized that unlike the general notice requirement in section 768.57(2), the mode of service authorized in the statute does not go to the heart of the presuit notice and screening process.[103] The court disapproved *Solimando* and *Glineck* because they conflicted with the court's opinion.[104]

D. *Health Care Practitioners*

The purpose of the notice provision is not to deny access to the courts,[105] or function as a trap for medical malpractice claimants.[106] Instead, it is designed to resolve claims amicably.[107] In *Weinstock v. Groth*,[108] the Supreme Court of Florida was faced with the issue of whether a clinical psychologist is a "health care provider" for purposes of determining whether a plaintiff must comply with the notice requirements of section 766.106(2). The court held that prospective defendants in medical negligence actions are "health care providers" as defined in section

99. *Id.* at 11.

100. *Patry*, 633 So. 2d at 11-12; *see* Ingersoll v. Hoffman, 589 So. 2d 223, 224 (Fla. 1991) (holding that the Act purports to aid in amicably resolving medical malpractice claims); *see also* Boyd v. Becker, 627 So. 2d 481, 484 (Fla. 1993) (stating that the purpose of the Act is to facilitate the resolution of claims prior to trial); Williams v. Campagnulo, 588 So. 2d 982, 983 (Fla. 1991) (stating that the Act promotes settlement at an early stage).

101. *Patry*, 633 So. 2d at 12.

102. *Id.* at 13.

103. *Id.*

104. *Id.*

105. Weinstock v. Groth, 629 So. 2d 835, 838 (Fla. 1993).

106. Zacker v. Croft, 609 So. 2d 140, 142 (Fla. 4th Dist. Ct. App. 1992), *review denied*, 620 So. 2d 760 (Fla. 1993).

107. Moore v. Winterhaven Hosp., 579 So. 2d 188, 189 (Fla. 2d Dist. Ct. App.) (citing Castro v. Davis, 527 So. 2d 250 (Fla. 2d Dist. Ct. App. 1988)), *review denied*, 589 So. 2d 294 (Fla. 1991).

108. 629 So. 2d 835 (Fla. 1993).

768.50(2)(b) of the *Florida Statutes*.[109] The court also recognized that the clear purpose of the Act is to promote settlement of medical malpractice claims in order to reduce the overall societal cost of health care and *not* to deny access to the courts.[110] Accordingly, the court held that "the proper test for determining whether a defendant is entitled to notice under section 766.106(2) is whether the defendant is directly or vicariously liable under the medical negligence standard of care set forth in section 766.102(1)."[111] Thus, because psychologists are not included in the definition of a "health care provider" in section 766.50(2)(b), the plaintiff was not required to comply with the notice requirement of section 768.106(2).

On the other hand, a potential defendant who does not fall within the definition of a "health care provider" may nevertheless be entitled to statutory notice if the defendant is vicariously liable for the acts of the health care provider.[112] Therefore, the employer of a health care provider may also be a prospective defendant even though the employer does not fall within the statutory definition of a health care provider.[113] Such an employer "may be vicariously liable under the professional medical negligence standard of care . . . when its agent or employee, who is a health care provider, negligently renders medical care or services."[114] For example, in *NME Properties, Inc. v. McCullough*,[115] the court held that a nursing home, which is not defined as a health care provider under the statutes, is entitled to statutory notice of a negligence action against it because the nursing home is vicariously liable for nurses who are both employees and health care providers.[116]

E. *Statute of Limitations*

In *Zacker v. Croft*,[117] a patient who suffered a heart attack after being treated for chest pains brought a medical malpractice suit against his physician. The patient mailed a notice of intent to initiate litigation to the

109. *Id.* at 837.

110. *Id.* at 838 (citing Ragoonanan v. Associates in Obstetrics & Gynecology, 619 So. 2d 482 (Fla. 2d Dist. Ct. App. 1993)).

111. *Id.*

112. *Id.*

113. *Weinstock*, 629 So. 2d at 838.

114. *Id.* (citing NME Properties, Inc. v. McCullough, 590 So. 2d 439 (Fla. 2d Dist. Ct. App. 1991)).

115. 590 So. 2d 439 (Fla. 2d Dist. Ct. App. 1991).

116. *Id.* at 441.

117. 609 So. 2d 140 (Fla. 4th Dist. Ct. App. 1992).

physician's last known address. The issue before the court was whether the patient tolled the statute of limitations by mailing the notice of intent to an incorrect address.[118] The court stated that insofar as the claimants exercised reasonable care and diligence to determine the correct address, the statute of limitations was tolled.[119] The court upheld the tolling of the limitations period in order to comply with the purpose of the notice requirements which is to promote the settlement of medical malpractice claims and not to be used as a trap for medical malpractice plaintiffs.[120]

It is important to note here that, although certain information must be contained in the notice, the statute does not require any particular form or specific wording.[121] The Fifth District Court of Appeal, in *Shands Teaching Hospital & Clinic, Inc. v. Barber*,[122] held that the notice only needs to describe the occurrence of the underlying claim and include "the expert corroborative opinion [which] is designed to prevent the filing of baseless litigation."[123] The court held that the notice of intent letter, coupled with the corroborating affidavit, adequately described the incident which gave rise to the negligence claim.[124] Therefore, the purpose of the statutory notice provision had been fulfilled.[125]

F. *The Ninety-Day Extension*

Another significant aspect of the Act is the provision for an extension of the ninety-day presuit screening period.[126] Under the statute, the plaintiff must conduct a reasonable investigation to determine whether there is a good faith belief that the defendant was negligent in the care and treatment of the plaintiff.[127] The notice of intent must then be served upon prospective defendants within the statutory period prescribed in section 95.11 of the *Florida Statutes*. However, section 766.104 permits an automatic ninety-day extension of the statute of limitations for those who petition the clerk of the court where the suit will be filed and who pay the

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118. *Id.* at 141.
119. *Id.* at 142.
120. *Id.*
121. *See* Tracey v. Barrett, 550 So. 2d 558, 560 (Fla. 2d Dist. Ct. App. 1989).
122. 638 So. 2d 570 (Fla. 5th Dist. Ct. App. 1994) (citing Stebilla v. Musallem, 595 So. 2d 136, 138 (Fla. 5th Dist. Ct. App.), *review denied*, 604 So. 2d 486 (Fla. 1992)).
123. *Id.* at 572.
124. *Id.*
125. *Id.*
126. FLA. STAT. § 766.104(2) (1993).
127. *Id.* § 766.104(1).

filing fee.[128] In *Kalbach v. Day*,[129] the court examined the ninety-day extension for filing medical malpractice actions and determined that it is "in addition to other tolling periods."[130] The court held that the extension begins to run *after* the ninety-day tolling provision under section 766.106 which commences after the notice of intent to initiate litigation has been mailed.[131]

Computation of the ninety-day screening period was addressed by the Supreme Court of Florida in *Boyd v. Becker*.[132] The court reviewed the appellate court's opinion which noted a conflict between *Barron v. Crenshaw*,[133] sections 766.106(3)(c) and 766.106(3)(a) of the *Florida Statutes*, and rule 1.650 of the *Florida Rules of Civil Procedure*.[134]

The court analyzed the statutory provisions involved and adopted the Fifth District Court of Appeal's decision which modified rule 1.650 of the *Florida Rules of Civil Procedure*.[135] In *Boyd*, the defendant, Dr. Becker, performed an operation on Mr. Boyd on June 3, 1988 which resulted in an unexpected scar on Mr. Boyd's neck. On June 2, 1990, Mr. Boyd applied for and received an automatic extension of the statute of limitations pursuant to section 766.104(2). On August 30, 1990, before the expiration of the ninety-day extension period, Mr. Boyd mailed to Dr. Becker a notice of intent to initiate litigation. The notice of intent was received by Dr. Becker on September 3, 1990. On February 1, 1991, Mr. Boyd filed suit against Dr. Becker. However, February 1st was the last day of Mr. Boyd's final extension which was computed from the date that the notice of intent was

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128. *Id.* § 766.104(2). Section 766.104(2) provides that:

> Upon petition to the clerk of the court where the suit will be filed and payment to the clerk of the filing fee, not to exceed $25, established by the chief judge, an automatic 90-day extension of the statute of limitations shall be granted to allow the reasonable investigation required by subsection (1). This period shall be in addition to other tolling periods. No court order is required for the extension to be effective. The provisions of this subsection shall not be deemed to revive a cause of action on which the statute of limitations has run.

Id.

129. 589 So. 2d 448 (Fla. 4th Dist. Ct. App. 1991), *dismissed sub nom.* Frei v. Kalbach, 598 So. 2d 76 (Fla. 1992).

130. *Id.* at 449 (quoting FLA. STAT. § 766.104(2) (1989)).

131. *Id.* at 450.

132. 627 So. 2d 481 (Fla. 1993).

133. 573 So. 2d 17 (Fla. 5th Dist. Ct. App. 1990).

134. *Boyd*, 627 So. 2d at 482.

135. *Id.* at 484 (adopting the holding in *Barron*, 573 So. 2d at 19).

received by Dr. Becker, rather than the date the notice of intent was mailed.[136]

Dr. Becker moved for dismissal arguing that Mr. Boyd's claim was barred by the statute of limitations. In support of his position, Dr. Becker "relied on the language in section 766.106(3)(a) that states: 'No suit may be filed for a period of 90 days after notice [of intent to initiate litigation] is *mailed* to any prospective defendant.'"[137] Dr. Becker argued that because the notice letter was mailed on August 30, 1990, the tolling of the statute of limitations began on that date and ended ninety days later on November 28, 1990. It was submitted that the claim should have been filed on or before January 28, 1991 which includes the sixty-day extension authorized under section 766.106(4). The defense asserted that on November 28, 1990, there was an implicit rejection of plaintiff's claim which triggered the countdown for the sixty-day extension.[138]

In response, however, Mr. Boyd argued that the ninety-day presuit period should be calculated based on the language in section 766.106(3)(c) which states that "[f]ailure of the prospective defendant [or insurer or self-insurer] to reply to the notice within 90 days after *receipt* shall be deemed a final rejection of the claim [for purposes of this section]."[139] Accordingly, Mr. Boyd argued that because the final sixty-day period began on December 3, 1990, ninety days after Dr. Becker received the notice, the lawsuit was timely filed on February 1, 1991.[140]

The court recognized that section 766.106(3)(a) conflicts with section 766.106(3)(c) because the latter provision computes the time period when the notice is *mailed* and the former from the date it is *received*.[141] The court held that the conflict should be resolved in a way that allows the claim

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136. *Id.* at 482-83.

137. *Id.* at 483 (quoting FLA. STAT. § 766.106(3)(a) (1989)) (alteration in original).

138. *Id.* Section 766.106(4) reads as follows:

> The notice of intent to initiate litigation shall be served within the time limits set forth in s. 95.11. However, during the 90-day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension. Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

FLA. STAT. § 766.106(4) (Supp. 1994).

139. *Boyd*, 627 So. 2d at 483 (quoting FLA. STAT. § 766.106(3)(c) (1989)) (alteration in original).

140. *Id.*

141. *Id* at 483.

to be considered on its merits.[142] To hold otherwise would effectively limit the time the defendant would have to evaluate the merits of the claim, which in turn would defeat the legislative intent of allowing each defendant a full ninety days to evaluate the merits of the claim.[143] The court then modified rule 1.650(d)(2) of the *Florida Rules of Civil Procedure* to conform with the Fifth District Court of Appeal's ruling in *Barron v. Crenshaw*.[144] The *Barron* court ruled that the ninety-day period for filing a response is computed from the date the notice is received.[145] To reconcile the difference, the court deleted the word "mailed" and inserted the word "received."[146]

In *Mason v. Bisogno*,[147] the court determined when the sixty-day provision of the statute begins to run. The court held that rule 1.650(d)(2) is clear and unambiguous in providing that the statute of limitations commences on the *earliest* of several events.[148] For example, commencement of the limitations period would include the claimant's receipt of a written rejection of the claim or the expiration of an extension of the ninety-day presuit period.[149] Therefore, in order to avoid an action from being time barred, the lawsuit must be filed before the earlier of either receipt of a written rejection or the expiration of the ninety-day extension period.

Additionally, the ninety-day period may be extended upon stipulation by the parties, thus tolling the statute of limitations during any such extension.[150] However, practitioners should note that an extension of the ninety-day presuit screening period as to some of the defendants *does not* toll the statute of limitations as to all defendants involved in the medical malpractice action.

G. *Pretrial Settlement*

Included among its many objectives, the Act is also designed to encourage pretrial settlement of meritorious claims in order to avoid

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142. *Id.*

143. *Id.* at 484.

144. *Boyd*, 627 So. 2d at 484; *see* Barron v. Crenshaw, 573 So. 2d 17, 19 (Fla. 5th Dist. Ct. App. 1990).

145. *Barron*, 573 So. 2d at 19.

146. *Boyd*, 627 So. 2d at 484.

147. 633 So. 2d 464 (Fla. 5th Dist. Ct. App.), *review denied*, 641 So. 2d 1345 (Fla. 1994).

148. *Id.* at 467.

149. *Id.*

150. *Id.* (citing FLA. STAT. § 766.104(4) (1991)).

expensive litigation and to anticipate further increases in medical malpractice insurance premiums.[151] The Act requires potential parties to assist an insurer or self-insurer in its investigation of potential claims.[152] The Act also requires potential parties to engage in informal discovery during the presuit investigation period in order to promote and expedite discovery.[153] Section 766.106(6) states that "[u]pon receipt by a prospective defendant of a notice of claim, the parties shall make discoverable information available without formal discovery. *Failure to do so is grounds for dismissal of claims or defenses ultimately asserted.*"[154]

In *Morris v. Ergos*,[155] the defendant physician appealed an order striking his defenses for failure to timely respond to presuit discovery requests. In reversing the trial court's order, the Second District Court of Appeal held that the striking of the physician's defenses was too excessive a remedy.[156] The court reasoned that "[w]hile the physician's failure to respond to the discovery questions until after suit was filed was clearly neglectful and it is questionable whether under the circumstances . . . the neglect was excusable, we conclude that the striking of his defenses was too harsh a remedy."[157] The court further stated that "even when a party's conduct in response to discovery requests is 'laggard and slothful,' dismissal of a suit is not necessarily warranted."[158] Thus, dismissal is justified "only in extreme situations for flagrant or aggravated cases of disobedience."[159]

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151. MacDonald v. McIver, 514 So. 2d 1151, 1152 (Fla. 2d Dist. Ct. App. 1987).

152. FLA. STAT. § 766.106(3)(a) (Supp. 1994). The section provides that:

> Each insurer or self-insurer shall investigate the claim in good faith, and both the claimant and prospective defendant shall cooperate with the insurer in good faith. If the insurer requires, a claimant shall appear before a pretrial screening panel or before a medical review committee and shall submit to a physical examination, if required. *Unreasonable failure of any party to comply with this section justifies dismissal of claims or defenses.*

Id. (emphasis added).

153. *Id.* § 766.106(6).

154. *Id.* (emphasis added). These provisions of the Act were tested and upheld in the following cases: Duffy v. Brooker, 614 So. 2d 539 (Fla. 1st Dist. Ct. App.), *review denied*, 624 So. 2d 267 (Fla. 1993); Pinellas Emergency Mental Health Servs. Inc. v. Richardson, 532 So. 2d 60 (Fla. 2d Dist. Ct. App. 1988); and Morris v. Ergos, 532 So. 2d 1360 (Fla. 2d Dist. Ct. App. 1988).

155. 532 So. 2d 1360 (Fla. 2d Dist. Ct. App. 1988).

156. *Id.* at 1361.

157. *Id.*

158. *Id.* (quoting Summit Chase Condominium Ass'n v. Protean Investors, Inc., 421 So. 2d 562, 564 (Fla. 3d Dist. Ct. App. 1982)).

159. *Id.* (quoting *Summit Chase Condominium Ass'n*, 421 So. 2d at 564).

However, in this case, it did not appear that the plaintiffs in *Morris* were prejudiced by the delay or that time was of the essence because they did not file suit for nearly five months after the expiration of the ninety-day period.[160] Therefore, the court reversed and remanded the action for further proceedings.[161]

In *Pinellas Emergency Mental Health Services, Inc. v. Richardson*,[162] the court vacated the trial court's order dismissing the defendant's answer and defenses in a medical malpractice action.[163] A notice of intent to initiate litigation was sent to the defendant, Pinellas Emergency Mental Health Service ("PEMHS"), with an accompanying discovery request, including a series of interrogatories and a request for production. The notice informed PEMHS that either the center or its medical malpractice insurance company was required by law to conduct a good faith investigation of the claim and serve a response to the claimant's attorney within ninety days. However, no response was furnished. The claimant's attorney sent a second discovery request which was also ignored by PEMHS. Suit was subsequently filed against PEMHS and several other defendants. The trial court entered a default judgment against PEMHS for failing to respond to the complaint.[164] The default was ultimately set aside and the court allowed PEMHS to file an answer and affirmative defenses to the complaint.[165] Thereafter, the plaintiffs filed a motion to dismiss the PEMHS's answer and defenses on the basis of the health service's failure to respond to the discovery requests and to follow the procedures contained in the Act. The trial court entered an order dismissing PEMHS's answer and defenses on the basis that, as a matter of law, the court did not have any discretion to disregard the defendant's failure to comply with the statute.[166]

The Second District Court of Appeal reversed the trial court's order.[167] The court stated that the trial court should have exercised its discretion to determine whether PEMHS's failure to make discoverable information available was unreasonable under the statute.[168] The court explained that although the statutory language in section 768.57(3)(a)

160. *Morris*, 532 So. 2d at 1361.
161. *Id.*
162. 532 So. 2d 60 (Fla. 2d Dist. Ct. App. 1988).
163. *Id.* at 61.
164. *Id.*
165. *Id.*
166. *Id.* at 62.
167. *Richardson*, 532 So. 2d at 63.
168. *Id.*

implies mandatory compliance, the legislature, by including the word "unreasonable," intended that compliance be exercised in a *reasonable* manner.[169] Therefore, "subsection (3)(a) should not be interpreted to mean that in every instance where a party does not cooperate with the insurer or self-insured in good faith, the party's claim or defenses must be dismissed *as a matter of law*."[170] Instead, dismissal is available subject to the exercise of discretion by the trial court, after it considers whether the prospective defendant acted unreasonably in failing to perform the statutory duty to cooperate with the presuit investigation.[171]

H. *Reasonable Investigation*

Duffy v. Brooker[172] provides an excellent discussion of the requirements of the statute regarding reasonable investigation. To comply with the intent of the medical malpractice statutes, the notice of intent and the corroborating medical expert opinion, taken together, must provide sufficient information indicating the manner in which the defendant doctor allegedly deviated from the standard of care.[173] Sufficient information is necessary for the defendants to evaluate the merits of the claim. Additionally, the response and the corroborating medical expert opinion must also provide sufficient information to the claimant as to why the defendant doctor did not purportedly commit malpractice.[174]

In *Duffy*, the First District Court of Appeal affirmed the trial court's order imposing sanctions against the defendants for failing to comply with the reasonable investigations provisions of the presuit screening process contained in section 766.106.[175] The plaintiff served a notice of intent

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169. *Id.*

170. *Id.*

171. *Id.*

172. 614 So. 2d 539 (Fla. 1st Dist. Ct. App.), *review denied*, 624 So. 2d 267 (Fla. 1993).

173. *Id.* at 545.

174. *Id.*

175. *Id.* at 546. Section 766.106(1)-(3) provides in relevant part:

> (1) As used in this section:
>
> (a) "Claim for medical malpractice" means a claim arising out of the rendering of, or the failure to render medical care or services.
>
> (b) "Self-insurer" means any self-insurer authorized under s. 627.357 or any uninsured prospective defendant.
>
> (c) "Insurer" includes the Joint Underwriting Association.
>
> (2) After completion of presuit investigation pursuant to s. 766.203 and prior to filing a claim for medical malpractice, a claimant shall notify each

prospective defendant and, if any prospective defendant is a health care provider licensed under chapter 458, chapter 459, chapter 460, chapter 461, or chapter 466, the Department of Business and Professional Regulation by certified mail, return receipt requested, of intent to initiate litigation for medical malpractice. Notice to the Department of Business and Professional Regulation must include the full name and address of the claimant; the full names and any known addresses of any health care providers licensed under chapter 458, chapter 459, chapter 460, chapter 461, or chapter 466 who are prospective defendants identified at the time; the date and a summary of the occurrence giving rise to the claim; and a description of the injury to the claimant. The requirement for notice to the Department of Business and Professional Regulation does not impair the claimant's legal rights or ability to seek relief for his claim, and the notice provided to the department is not discoverable or admissible in any civil or administrative action. The Department of Business and Professional Regulation shall review each incident and determine whether it involved conduct by a licensee which is potentially subject to disciplinary action, in which case the provisions of s. 455.225 apply.

(3)(a) No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant. During the 90-day period, the prospective defendant's insurer or self-insurer shall conduct a review to determine the liability of the defendant. Each insurer or self-insurer shall have a procedure for the prompt investigation, review, and evaluation of claims during the 90-day period. This procedure shall include one or more of the following:

1. Internal review by a duly qualified claims adjuster;

2. Creation of a panel comprised of an attorney knowledgeable in the prosecution or defense of medical malpractice actions, a health care provider trained in the same or similar medical specialty as the prospective defendant, and a duly qualified claims adjuster;

3. A contractual agreement with the state or local professional society of health care providers, which maintains a medical review committee;

4. Any other similar procedure which fairly and promptly evaluates the pending claim.

Each insurer or self-insurer shall investigate the claim in good faith, and both the claimant and prospective defendant shall cooperate with the insurer in good faith. If the insurer requires, a claimant shall appear before a pretrial screening panel or before a medical review committee and shall submit to a physical examination, if required. Unreasonable failure of any party to comply with this section justifies dismissal of claims or defenses. There shall be no civil liability for participation in a pretrial screening procedure if done without intentional fraud.

(b) At or before the end of the 90 days, the insurer or self-insurer shall provide the claimant with a response:

1. Rejecting the claim;

2. Making a settlement offer; or

letter on the defendant alleging that the defendant's negligence caused her husband's death. The notice letter attached a four-page affidavit of a board certified gastroenterologist and internist. The affidavit stated that there were reasonable grounds to believe that the defendant committed malpractice in his care and treatment of the decedent which resulted in his demise. The affidavit described the documents that were reviewed during the investigation and the grounds supporting the opinion.[176] In response to the notice of intent to initiate litigation, Mr. Daniel Stephens, a claims adjuster for the defendant's insurance carrier, sent a letter stating that "[a]fter a thorough review of this matter, we find no basis to support a claim of negligent injury against Dr. Patrick Duffy. Thereby your client's claim is hereby denied. Enclosed is a copy of the required corroborating affidavit to support our position."[177]

Thereafter, the plaintiff filed a complaint against the defendant doctor and filed a Motion Requesting Determination as to Whether [the] Defendant's Denial of Claims Rests on a Reasonable Basis according to section 766.206(1) of the *Florida Statutes*.[178] Prior to the hearing, the defense attorney filed a response to the motion and attached to it a sworn statement

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3. Making an offer of admission of liability and for arbitration on the issue of damages. This offer may be made contingent upon a limit of general damages.

(c) The response shall be delivered to the claimant if not represented by counsel or to the claimant's attorney, by certified mail, return receipt requested. Failure of the prospective defendant or insurer or self-insurer to reply to the notice within 90 days after receipt shall be deemed a final rejection of the claim for purposes of this section.

(d) Within 30 days of receipt of a response by a prospective defendant, insurer, or self-insurer to a claimant represented by an attorney, the attorney shall advise the claimant in writing of the response, including:

1. The exact nature of the response under paragraph (b).

2. The exact terms of any settlement offer, or admission of liability and offer of arbitration on damages.

3. The legal and financial consequences of acceptance or rejection of any settlement offer, or admission of liability, including the provisions of this section.

4. An evaluation of the time and likelihood of ultimate success at trial on the merits of the claimant's action.

5. An estimation of the costs and attorney's fees of proceeding through trial. . . .

FLA. STAT. § 766.106(1)-(3) (Supp. 1994).

176. *Duffy*, 614 So. 2d at 540.

177. *Id.*

178. *Id.*

by an expert. The sworn statement was identical to the statement in the initial response letter, but added the following paragraph that "I have previously rendered said medical opinion on December 11, 1990, and that said expert opinion was inadvertently not sworn and attested to. My opinions have not deviated or changed any from the opinion rendered on December 11, 1990."[179]

The issues presented at the hearing included whether the expert's statement complied with section 766.203(3) and whether a reasonable investigation was performed by the insurance company and the expert.[180] The plaintiff had the burden of establishing a prima facie case that she had complied with the statute, thus shifting the burden to the defendant.[181] At the hearing, the claims adjustor testified that while she did not have any "on-hand" involvement with the review of the claim, she believed that there was a good faith review and determination by the company that the defendant was not negligent.[182]

After listening to the arguments, the trial judge rejected the defense's argument and struck the insurance company's response.[183] The court held the insurance company "personally responsible to the plaintiff" for reasonable attorney's fees and costs incurred during the investigation of the claim.[184] The trial court concluded that the insurance company's response

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179. *Id.*

180. *Id.* at 540-41.

181. *Duffy*, 614 So. 2d at 541.

182. *Id.* The claims adjuster who testified at trial was the successor adjuster. She was not the same person who evaluated the claim upon receipt of plaintiff's notice of intent to initiate litigation. *Id.*

183. *Id.* at 542.

184. *Id.* The trial judge stated:

> There is no factual information of any nature whatsoever in either the letter of December 13, 1990, from Stephens to plaintiff's attorney or the "CORROBORATION OF MEDICAL EXPERT OPINION" signed by Dr. Edgerton by which one might "verify" that a "reasonable investigation" had preceded denial by Physicians of the claim. In particular, the Court notes that, in its opinion, Dr. Edgerton's statement consists of nothing more than a series of legal conclusions. It identifies neither the medical records which Dr. Edgerton reviewed nor the factual bases upon which his ultimate legal conclusion rests. It does not set forth Dr. Edgerton's professional qualifications, so that one might attempt to "verify" whether Dr. Edgerton qualifies as a "medical expert," as that term is defined in § 766.202(5). In fact, it does not even indicate where Dr. Edgerton practices. Moreover, because of these deficiencies, it is impossible to determine intelligently whether or not Dr. Edgerton made a "reasonable investigation" (or, for that matter, whether he made *any* investigation).

Duffy, 614 So. 2d at 542 (citing FLA. STAT. § 766.205(5)(a) (1989)).

rejecting the claim "was not in compliance with the 'reasonable investigation' requirements of the statute and did not rest 'on a reasonable basis.'"[185] To hold otherwise "would fly in the face of the clearly expressed legislative intent."[186]

In affirming the trial court's order, the appellate court reiterated the purpose of the medical malpractice suit which is to require defendant's to conduct reasonable investigations in good faith.[187] Because the insurance company failed to comply with the statutory requirements of conducting a good faith investigation of the allegations set forth by the claimant, the court properly imposed sanctions against the insurance company.[188] In contrast, *Dressler v. Boca Raton Community Hospital*[189] illustrates the importance of complying with the intent of the medical malpractice statutes from the plaintiffs' perspective. The appellate court upheld the trial court's dismissal of plaintiff's complaint where the plaintiff failed to provide any information regarding the manner in which the defendants had allegedly deviated from the standard of care.[190] As a result, the stated purpose of the Act was thwarted and, thus, the court's dismissal of the complaint was proper.[191]

However, nothing in the Act requires the corroborating expert opinion to identify every possible instance of medical negligence. For example, in *Davis v. Orlando Regional Medical Center*,[192] the corroborating affidavit alleged several acts of negligence against the defendant hospital in causing injury to the patient.[193] Although the affidavit did not mention any post-surgical negligence, it was revealed during discovery that post-surgical negligence was in fact an issue. Thus, the hospital sought to exclude that evidence on the basis that the affidavit failed to mention it.[194] The court rejected the hospital's position holding that the purpose of the corroborating opinion is *not* to require a protracted detail of the plaintiff's theory of the case.[195] The corroborating opinion simply provides justification for the plaintiff's claim and demonstrates that it is not frivolous.

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185. *Id.* at 543.
186. *Id.*
187. *Id.*
188. *Id.* at 546.
189. 566 So. 2d 571 (Fla. 4th Dist. Ct. App. 1990), *review denied*, 581 So. 2d 164 (Fla. 1991).
190. *Id.* at 574.
191. *Id.*
192. 654 So. 2d 664 (Fla. 5th Dist. Ct. App. 1995).
193. *Id.* at 665.
194. *Id.*
195. *Id.*

In *Damus v. Parvez*,[196] the court was faced with the issue of whether a physician is obligated to produce a verified medical report where the physician did not issue a response rejecting the medical malpractice claim. The defendant doctor did not send the plaintiff a response denying liability. Instead, the defendant denied liability in his answer to the complaint. The plaintiff argued that the medical report should be produced in order to ensure that the denial was made "in good faith." The court held that in order to comply with the good faith requirement of section 766.206(3), the report need not be produced prior to an evidentiary hearing where there was *no* response rejecting the claim.[197] However, this subjects the physician to the risk of being sanctioned by the trial court's striking the physician's pleadings and assessing attorney's fees and costs pursuant to section 766.206(3) *if* the court finds that good faith was lacking.[198]

IV. CONCLUSION

The foregoing is a sampling of the cases decided since the enactment of the Comprehensive Medical Malpractice Reform Act of 1985. Practitioners in this field of law would be well-advised to strictly follow the precise requirements of the Act. With careful attention to details and the specific procedures required by the Act, potential difficulties and loss of rights may be avoided in handling medical malpractice claims or defenses. Of course, whether the Act will actually accomplish the goals of the Florida Legislature still remains to be seen.

196. 556 So. 2d 1136 (Fla. 3d Dist. Ct. App. 1989).
197. *Id.* at 1137-38.
198. *Id.* at 1138.

The Mediation Experience of Family Law Attorneys

Susan W. Harrell*

TABLE OF CONTENTS

Family mediation can be used most effectively as a method of dispute resolution if family law attorneys actively support its use. This article reports the results of a study of the experiences and uses of mediation

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among Florida family law attorneys. Questionnaires were sent to 500 members of the Family Law Section of the Florida Bar. The results indicate that a majority of attorneys who were originally forced into using mediation perceive a great number of benefits in the process.

I. THE MEDIATION EXPERIENCE OF FAMILY LAW ATTORNEYS—MEDIATION IN GENERAL

Although mediation has been in use throughout the world for centuries, it did not begin to gain support as a viable alternative to our adversarial judicial system until the last fifteen or twenty years. Mediation is a type of Alternative Dispute Resolution ("ADR"), which has long been touted as the answer to many problems in our judicial system. This claim has been supported by research reflecting positive effects of ADR upon the judicial system and upon the parties who have used mediation. The original claims and subsequent supporting literature have combined to produce steady growth in all types of ADR over the last fifteen years.[1]

In the family law arena, mediation appeared to be a perfectly logical solution to the inappropriateness of asking the legal system to become involved in and attempt to solve the private problems of families. More so than any other area, family law disputes seemed most in need of the mediation process. Family law disputes involve the most private personal of issues. The courts are ill-equipped to truly resolve such problems, and in the past there were very few viable options until the advent of mediation. Mediation allows the parties to take control of their own issues and process, allows for flexibility which the courts do not have, provides an avenue for addressing issues not specifically covered in the statutes, and removes the court from the emotional issues that attend such disputes.

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1. *See* Craig McEwen, *State Justice Institute Conference Examines Research on Court-Connected ADR*, DISP. RESOL. MAG., Spring 1994, at 7, 7; NATIONAL INST. FOR DISP. RESOL., NATIONAL SURVEY FINDINGS ON: PUBLIC OPINION TOWARDS DISPUTE RESOLUTION 1992 (finding that 82% of those surveyed would engage in arbitration or mediation, as opposed to litigation); *see also* Frank E. A. Sander & Stephen B. Goldberg, *Making the Right Choice*, A.B.A. J., Nov. 1993, at 66, 66 (stating that ADR settles disputes at a more expedient rate and at a lower cost, which in turn, "satisf[ies] clients' dispute resolution goals better than litigation"). *But see* Robert D. Raven, *The Future of Court-Annexed ADR*, DISP. RESOL. MAG., Spring 1994, at 2, 2 (arguing that while ADR has expanded within the court system, the progress has been slow because the "court-annexed arbitration programs often take months to settle").

II. MEDIATION IN FLORIDA

In Florida, there are three types of mediation recognized by statute or procedural rule: county, circuit, and family. The Supreme Court of Florida provides a method by which a person can become "certified" in each area of mediation based on education, training, and completion of a mentorship.[2] Florida allows certification of attorney-mediators and mental-health-mediators, as well as being one of the few states in the union which certifies accountant-mediators.[3]

Although all three types are used extensively throughout the state, there are a greater number of persons certified by the Supreme Court of Florida as Circuit Court Mediators (1214) and County Court Mediators (1110) than as Family Court Mediators (968).[4] An interesting note, however, is that of the 5166 persons who have completed mediation training, approximately 50% are not certified by the Supreme Court of Florida.[5]

Notwithstanding the fact that the use of all three types of mediation has grown in the recent past, it appears that attorneys have more readily embraced the use of circuit and county court mediation, while the use of family court mediation seems to have stalled. More complaints seem to be voiced by attorneys concerning Family Court Mediation than the other types of mediation. There are concerns that mediation cannot be effective if it is mandatory because of the nature of the relationship issues involved. Additionally, there are concerns that mediation is not appropriate for domestic violence cases, that the mediation process creates disadvantages based on gender, and that non-lawyer mediators are trained insufficiently in legal issues.[6] These complaints are heard from numerous individuals involved in the family law arena: judges, mental health professionals, teachers, guardians ad litem, and most importantly, attorneys.

The growth of mediation in the family law area could be facilitated by cultivating more support for its use among family law practitioners. By defining the problems perceived by family law attorneys, we may be able to correct any misperceptions of the mediation process. This article explores some of the perceptions family law attorneys have concerning their experience with, and use of, mediation.

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2. FLA. R. CERTIFIED & COURT-APPOINTED MEDIATORS 10.010.
3. *Id.* 10.010(b).
4. Sharon Press, *Exploring Alternatives*, FLA. DISP. RESOL. CTR. NEWSL., Spring 1994, at 1, 7.
5. *Id.*
6. *Id.*

III. THE SURVEY

In examining the use of family law mediation, a written survey was sent to 500 members of the Family Law Section of the Florida Bar.[7] A random sample of membership across the state was performed by the Family Law Section and surveys were sent to these members in the Spring of 1994.[8] A total of 150 attorneys responded to the survey.

A. *Demographics*

Geographically, most of the respondents (43.6%) practiced primarily in South Florida, in the 11th, 15th, 16th, 17th, and 20th Judicial Circuits.[9] The next largest group of respondents (32.3%) practiced primarily in Central Florida, in the 6th, 9th, 10th, 12th, 13th, 18th, and 19th Judicial Circuits.[10] The smallest group of respondents (22.2%) practiced in the Florida Panhandle, in the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, and 14th Judicial Circuits.[11]

Almost one-half of the respondents (46.4%) have practiced family law for ten years or less.[12] A little less than one-third of the respondents (29.6%) began practicing law between 1974 and 1983.[13] While 16% of the respondents began practicing family law between 1964 and 1973, only 6.7% of the respondents began before 1964.[14]

Most of the respondents devote a substantial percentage of their practices to family law matters. Well over half of the respondents (60.4%) indicated that over 50% of their practice is devoted to marital and family law cases, and another 26.8% indicated that they spend between 50% and 75% of their practice in family law matters.[15] One-third of the respondents (33.6%) devote over 75% of their practice to family law cases.[16]

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7. The Florida Bar has approximately 48,000 members and the Family Law Section has 3047 members. Susan W. Harrell, Survey Responses, (Sept. 21, 1994) (on file with author) [hereinafter Survey]; *see infra* part IV.

8. The survey instrument that was used solicited a wide range of information. A portion of the results of this survey was used to support another article. *See* Susan W. Harrell, *Why Attorneys Attend Mediation Sessions*, MEDIATION Q., Summer 1995, at 369.

9. Survey, *supra* note 7, at 1.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Survey, *supra* note 7, at 1.

15. *Id.*

16. *Id.*

Only 6% of the respondents indicated that they were Florida Bar Board Certified in Family Law,[17] and less than one-fourth of the respondents (18.1%) had taken a Supreme Court of Florida-Certified forty-hour Family Law Mediation Training course.[18] Of the respondents who did complete a certified family law mediation training course, the majority did so between 1990 and 1994 (85.1%), and the remainder (14.9%) between 1983 and 1988.[19]

B. *The Experience of Florida Family Law Attorneys—The First Attempt*

While some Florida family law practitioners first had clients attempt mediation in the late 1980s, it was not until the early 1990s that a large number of attorneys began to see their cases go through the mediation process. Most of the respondents (46.3%) had their first experience with family law mediation between 1990 and 1992.[20] Not quite one-third of the respondents (28.2%) had their first experience with family law mediation between 1986 and 1989.[21] Only 7.5% of the attorneys who responded first attempted family law mediation between 1982 and 1985, while 2.1% first attempted family law mediation between 1976 and 1979.[22] A surprising 10% of the respondents did not have a case employ family law mediation until 1993 or 1994.[23]

When attorneys first took their cases to mediation, it was, for the most part, involuntary. Well over half of the respondents (55.7%) indicated that their first experience with mediation was initiated by a court order.[24] However, just over 30% indicated that their first attempt in mediation was initiated by their own suggestion.[25] This can be interpreted to show that these attorneys had the inclination to attempt mediation. However, the opposing attorney was credited with initiating the use of family law mediation by only 6% of the respondents.[26]

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17. *Id.*
18. *Id.*
19. Survey, *supra* note 7, at 1-2.
20. *Id.* at 2.
21. *Id.*
22. *Id.*
23. *Id.*
24. Survey, *supra* note 7, at 2.
25. *Id.*
26. *Id.*

The respondents were also asked to rate their first experience with family law mediation.[27] Almost two-thirds (63.1%) felt the experience was "excellent" (23.5%) or "good" (39.6%), while 30.9% classified their first attempt at family law mediation as either "fair" (24.2%) or "poor" (6.7%).[28] Such ratings of their first experience could be attributed to many different factors, which fell beyond the scope of the survey instrument. However, there may be some relationship between the ratings and the discipline of the professional who acted as the mediator.

About two-thirds (62.4%) of the respondents indicated that their first case involving family law mediation was mediated by an attorney-mediator and 10.7% utilized a judge-mediator.[29] Mental-health-mediators were the second largest type of mediator used, with 10.7% using a masters degree mental health professional and 2.7% using a doctorate degree mental-health-professional. A certified public accountant ("CPA") was used as a mediator in only 2% of the first cases.[30] In addition, there were a few respondents who could not remember, or did not know the background of, their first family law mediator.

C. *Recent Experience of Florida Family Law Attorneys*

The respondents were asked a series of questions relating to family law cases, which they had worked on over the twelve months immediately preceding receipt of the survey.[31] These questions explored the number of such cases in which mediation was attempted and completed, and who made the initial suggestion that mediation be considered.[32]

D. *Mediation Was Attempted*

Most of the respondents used mediation on a frequent basis. Over the twelve-month period, 44.9% of the respondents attempted mediation in over 50% of their family law cases, while 53.7% of the respondents attempted mediation in less than 50% of their family law cases during that same period.[33]

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27. *Id.*
28. *Id.*
29. Survey, *supra* note 7, at 2.
30. *Id.*
31. *Id.*
32. *Id.* at 3.
33. *Id.*

E. *Mediation Was Successfully Completed*

Successful completion was defined to include total and partial success, that is, an agreement was reached on one or more issues to the satisfaction of the client. Based on this definition, 44.3% of the respondents indicated that a successful mediation was experienced in over 50% of their cases during this twelve-month period.[34] However, 53% of the respondents indicated that a successful mediation was experienced in less than 50% of their cases during this period of time.[35]

F. *The Respondent-Attorney Made the Initial Suggestion to Use Mediation*

When the respondents were asked what percentage of cases they had made the initial suggestion that mediation be considered, 39.5% said they were responsible in over 50% of their cases.[36] Just over one-half (55.1%) said they were responsible for making the initial suggestion to consider mediation in less than 50% of their cases during the same period of time. One contributing factor to this response could be the number of courts which automatically issue mandatory mediation orders.

G. *The Opposing Attorney Made the Initial Suggestion to Use Mediation*

Interestingly, while a greater number of the respondents credit themselves with initiating mediation, most of them did not provide any credit to their opposing counsel for making the initial suggestion. Over 86% of the respondents estimated that their opposing attorney made the initial suggestion that mediation be considered in less than 50% of their family law cases during the twelve-month period.[37] Only 6% indicated that the opposing attorney had made the initial suggestion in 50% to 75% of their cases during this same period of time.[38]

34. Survey, *supra* note 7, at 3.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*

H. *The Client Made the Initial Suggestion to Use Mediation*

It is clear that mediation is infrequently proffered by clients. Over 92% of the respondents indicated that their clients suggested mediation as a consideration in less than 50% of their cases during the twelve-month period in question.[39] Additionally, most of the respondents only credited the client for suggesting this first step in less than 5% of their cases during that same period of time.[40]

I. *The Judge Made the Initial Suggestion to Use Mediation*

In their recent experience, 61.11% of the respondents indicated that the judge did not initiate mediation in most of their cases.[41] Only one-third (32.9%) of the respondents experienced judges making this initial suggestion in over 50% of their cases during the period in question.[42] These results seem to suggest that attorneys are discussing and initiating mediation before court involvement, even though most of the respondents' first mediation experience was court ordered.

J. *Why Do Attorneys Avoid Mediation?*

When asked to identify a reason or reasons that the respondents have used to justify not attempting mediation in their family law cases over the twelve-month period, the responses were very diverse. The reason most often used by the respondents (48.3%) was that there was "[n]o possibility of settlement outside a courtroom."[43]

The remaining responses were spread among a number of possible choices. Just over 14% of the respondents felt that an allegation of spouse abuse was sufficient justification for not attempting mediation.[44] The next most frequent response was that there is no reason not to use mediation and that it should always be attempted.[45] Approximately the same number of respondents were concerned about the financial cost of mediation for some of their clients.[46]

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39. Survey, *supra* note 7, at 3.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. Survey, *supra* note 7, at 3.
45. *Id.*
46. *Id.*

Legal issues were perceived to be too complex for a non-attorney mediator in some cases and justified foregoing any attempt at mediation by 10.7% of the survey respondents.[47] However, only 2% of the respondents avoided mediation because they felt that there were not enough attorney-mediators available.[48] Of the respondents, 3.4% justified not attempting mediation because the financial issues in some of their cases were too complex for a non-CPA-mediator.[49] Less than 1% did not attempt mediation because there were not enough CPA-mediators.[50] These responses could be perceived as pure territorialism by attorneys. While attorneys continue to complain that non-lawyer mediators are inadequately trained in family law, they do not seem willing to recognize or admit that attorney-mediators are insufficiently trained in child development, family dynamics, stages of the divorce process, and how to deal with two parties simultaneously.

Fewer than 1% of the respondents (0.7%) did not engage in mediation in some of their cases because they represented the wife and apparently felt the client's gender made an attempt at mediation inappropriate.[51] This would counter the argument that mediation is biased against women.[52]

K. *How Do Attorneys Use Mediation?*

To get some idea as to the investment each of the respondents made into pursuing the process of mediation by educating their clients, the survey asked each respondent to estimate the amount of time spent preparing each client for his or her first family law mediation session. Over half of the respondents (54.4%) spent between thirty minutes and one hour with each client.[53] A fairly equal number of respondents spent over one hour with each client (19.5%), and less than thirty minutes with each client (20.1%).[54] There were 2.7% of the respondents who spent no time with their clients preparing them for their first mediation session.[55] These

47. *Id.*
48. *Id.*
49. Survey, *supra* note 7, at 3.
50. *Id.*
51. *Id.*
52. *See* Junda Woo, *Mediation Seen As Being Biased Against Women*, WALL ST. J., Aug. 4, 1992, at B1, B7 (claiming insignificant gender bias against women engaged in the mediation process).
53. Survey, *supra* note 7, at 3.
54. *Id.*
55. *Id.*

results reflect that most of the attorneys understand the importance of preparing clients for mediation, and the possible relationship between such preparation and a successful outcome in the mediation process.

L. *Why Do Attorneys Use Family Law Mediation?*

The survey asked respondents to list the five most important benefits of using family law mediation. The most common response was "[m]ediation increases settlement possibilities" (94%).[56] This result clearly indicates the major selling point of mediation among family law attorneys.

The next most frequent response, "[s]aves the client money" (79.2%), is a positive indication that a majority of attorneys are conscious of the economic burden which litigation places on their clients.[57] However, the respondents were less concerned (63.8%) with the time that can be saved by the clients, the attorneys, and the court in applying mediation.[58]

Another cited benefit (63.1%) is that mediation serves the best interests of the children by not litigating.[59] Just under two-thirds of the respondents (62.4%) preferred family law mediation because it "tempers . . . [the] attitude[s] of unreasonable clients."[60]

Just over one-half of the respondents (55%) perceived mediation as benefiting the client by affording them with a certain "measure of control."[61] Beyond that, fewer respondents believed mediation provided the client with much satisfaction. Only 35.6% felt that the use of family law mediation left clients satisfied with the judicial process.[62] A mere 6.7% believed that the use of family law mediation made clients more satisfied with their attorney.[63]

A few attorneys have a distorted view of the potential benefits of family law mediation. Family law mediation is seen by some attorneys as a "[g]ood discovery tool" (8.1%), and as a "[u]seful tactic to gain time [by] delay[ing] final hearing[s]" (0.7%).[64]

To determine whether most attorneys were motivated by altruism when they pursued mediation, the respondents were asked to estimate the

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56. *Id.* at 4.
57. *Id.*
58. Survey, *supra* note 7, at 4.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. Survey, *supra* note 7, at 4.
64. *Id.*

percentage of their family law cases over the twelve-month period in which they pursued mediation with the sole or primary objective being to obtain more information from the opponent. In other words, whether they used mediation as a discovery tool. It is comforting to note that the largest number of respondents (80.5%) used mediation with this sole or primary objective in less than 5% of their cases during the twelve-month period.[65] However, 10.7% used mediation to accomplish this objective in 5% to 25% of their cases, and 2% of the respondents did so in 25% to 50% of their cases.[66] Another 0.7% pursued mediation as a discovery tool in 50% to 75% of their cases over the twelve-month period.[67]

M. *Respondent's Comments*

A large number of attorneys who responded to the survey also spent time providing detailed comments to many of the questions. Overall, the remarks expressed a consensus on four major issues: the benefits of family law mediation far outweigh the disadvantages; although there are some attorneys who abuse the family law mediation process, it is infrequent and may be partially prevented through education of the family law mediation process; attorneys would be far more likely to encourage use of the family law mediation process if there were more well-trained and experienced family law mediators available; and, attorneys and judges alike need to be educated that mediation is not a cure-all. Although it is appropriate and effective in a vast majority of cases, there are certain situations that make family law mediation inappropriate.

N. *Conclusions*

The results of this survey confirm that the majority of family law attorneys in Florida find mediation beneficial and use it appropriately in serving the client's interests. It is shocking to see that attorneys, albeit a small percentage, would abuse this process by using it as a discovery tool. The true goal of the process is to assist parties in resolving their family disputes with the least amount of damage to their relationship. Notwithstanding that this type of abuse is apparently accomplished in the name of zealous advocacy, it is apparent that a small percentage of attorneys who may sabotage the process do not understand that mediation in family law

65. *Id.*
66. *Id.*
67. *Id.*

cases cannot be viewed in the same fashion as other types of mediation. The "misuse . . . [of the mediation] process . . . turn[s] it into an adversarial proceeding."[68] Therefore, attorneys must allow mediation to serve its purpose.

Despite research which indicates that clients are more satisfied when mediation is used,[69] certain attorneys still do not seem to believe their clients will be as satisfied with their services when mediation is employed. Some attorneys are not willing to surrender control of their cases to the mediation process. The bottom line, they maintain, is that clients are only interested in having their problems solved. Nancy S. Palmer, the Immediate Past-Chair of the Family Law Section of the Florida Bar, explained the intention of the mediation process to litigators who see mediation as taking fees from their pockets and stated, "[a]s the dinosaur was once roaring and powerful, so was the family litigator, but as the dinosaur, the roaring and powerful litigator could soon be extinct, if we fail to be sensitive to the public's changing demands."[70]

Through the pursuit of mediation, there is an extreme possibility of reaching at least a partial success for the client. Litigation only creates more problems for the client.[71] As more attorneys focus on the purpose of family law mediation and the numerous benefits to be gained by all those concerned, the true interests of clients will be better served.

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68. Jose C. Feliciano, *Lawyers, Advocates and Mediation: Three Perspectives*, DISP. RESOL. MAG., Spring 1994, at 4, 6.

69. Nina R. Meierding, *Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements*, MEDIATION Q., Winter 1993, at 157.

70. Nancy S. Palmer, *Family Law — Letter to the Editor*, FLA. B. NEWS, June 1, 1994, at 2, 3.

71. *See* Robert L. Haig & Robert S. Getman, *Does "Hardball" Litigation Produce the Best Result for Your Client?*, FLA. B.J., Apr. 1993, at 30, 33-34 (discussing the court's reluctance in implementing "hardball litigation"); *see also* James E. Brill, *Long After the Price is Forgotten*, FLA. B. NEWS, Apr. 1, 1993, at 11, 11 (stating that quality lawyer-like skills include "prompt and appropriate action on the clients' behalf"); Philip H. Magner Jr., *One Lawyer's Guide to the Meaning of the Profession*, FLA. B. NEWS, Nov. 1, 1992, at 9, 9 (emphasizing that "'[h]ardball' should be played on the diamond, and not in the practice of law"); Benjamin Sells, *Give Peace, Alternative Dispute Resolution a Chance*, FLA. B. NEWS, June 15, 1994, at 23, 23 (advocating mediation and settlement in the quest for peace between adversarial parties).

IV. APPENDIX A—SURVEY RESPONSES

1. The circuit in which you primarily practice:

0 = 1.3%	5 = 2%	10 = 2%	15 = 5.4%
1 = 3.4%	6 = 8.1%	11 = 18.1%	16 = 1.3%
2 = 3.4%	7 = 4%	12 = 3.4%	17 = 16.1%
3 = 0%	8 = 2%	13 = 6%	18 = 4%
4 = 7.4%	9 = 5.4%	14 = 0%	19 = 3.4%
			20 = 2.7%

Other = 0.6%

2. Are you Board Certified in Family Law ?

No = 94% Yes = 6%

3. The year in which you began practicing marital and family law:

1948 - 1969 = 11.4%
1970 - 1979 = 26.7%
1980 - 1989 = 43.8%
1990 - 1993 = 16.8%
Other = 1.3%

4. The approximate percentage of your practice over the last 12 months which was devoted to marital and family law cases:

0% - 25% = 14.1%
25% - 50% = 24.8%
50% - 75% = 26.8%
75% - 100% = 33.6%
Other = 0.7%

5.A. Have you taken a Florida Supreme Court Certified 40-hour family law mediation training course?

No = 81.2% Yes = 18.1% Other = 0.7%

5.B. If yes, what year?

1983 - 1988 = 2.7% 1990 - 1994 = 15.4% Other = 81.9%

6. The approximate year in which you first had one of your family law clients *attempt* mediation:

1976 - 1979 = 2.1%
1982 - 1985 = 7.5%
1986 - 1989 = 28.2%
1993 - 1994 = 10%
Other = 52.2%

7. Your first experience with family law mediation (your first family law case in which mediation was *attempted*) was initiated by:

The opposing attorney = 6%
My suggestion = 30.2%
A court order = 55.7%
Other = 8.1%

8. Your first experience with family law mediation (your first family law case in which mediation was *attempted*) was:

Excellent = 23.5%
Good = 39.6%
Fair = 24.2%
Poor = 6.7%
Other = 6%

9. Your first experience with family law mediation (your first family law case in which mediation was *attempted*) was handled by:

CPA mediator = 2%
Ph.D. level mental health mediator = 2.7%
Master's level mental health mediator = 10.7%
A former/retired judge = 10.7%
Attorney mediator = 62.4%
Other = 11.5%

For Questions 10-15, please provide the approximate percentage of your marital and family law cases over the last 12 months . . .

10. in which mediation was *attempted*:
11. in which mediation was *successfully completed*:
12. in which *you* made the initial suggestion to your client that he/she consider mediation:
13. in which *your client* made the initial suggestion that mediation be considered:
14. in which *the opposing attorney* made the initial suggestion that mediation be considered:
15. in which *the judge* made the initial suggestion that mediation be considered:

	Q10	Q11	Q12	Q13	Q14	Q15
0%-5%	14.1%	17.4%	20.8%	78.5%	42.3%	26.2%
5%-25%	24.8%	14.1%	14.8%	12.1%	32.9%	19.5%
25%-50%	14.8%	21.5%	19.5%	2%	11.4%	15.4%
50%-75%	22.1%	24.2%	17.4%	0%	6%	11.4%
75%-100%	22.8%	20.1%	22.1%	0%	0%	21.5%
Other	1.4%	2.7%	5.4%	7.4%	7.4%	6%

16. Which of the following reasons have you used during the last 12 months to justify *NOT* attempting family law mediation:

I represent the wife = 0.7%
Not enough CPA-mediators available = 0.7%
Not enough mental-health-mediators available = 0.7%
Not enough attorney-mediators available = 2%
Financial matters too complex for non-CPA mediator = 3.4%
Legal issues too complex for non-attorney mediator = 10.7%
Spousal abuse is being alleged = 14.8%
No possibility of settlement outside a courtroom = 48.3%
Other = 18.7%

17. Approximately how much time do you spend preparing each client for his/her first family law mediation session?

None	=	2.7%
Less than 30 minutes	=	20.1%
30 minutes to 1 hour	=	54.4%
More than one hour	=	19.5%
Other	=	3.3%

18. The approximate percentage of your marital and family law cases over the last 12 months in which you pursued mediation with the *sole or primary objective* being to obtain more information (i.e., as a discovery tool):

Less than 5%	=	80.5%
5% - 25%	=	10.7%
25% - 50%	=	2%
50% - 75%	=	0.7%
75% - 100%	=	0%
Other	=	6.1%

19. Of the following possible *benefits* of family law mediation, please check the five which you feel are most important:

1. "Mediation increases settlement possibilities" = 94%
2. "Saves the client money" = 79.2%
3. "Saves time for the clients, attorneys, and court" = 63.8%
4. "In best interest of minor children not to litigate" = 63.1%
5. "Tempers attitude of unreasonable clients" = 62.4%
6. "Gives the client some measure of control" = 55%
7. "Clients are more satisfied with judicial process" = 35.6%
8. "Good discovery tool" = 8.1%
9. "Clients are more satisfied with their attorney" = 6.7%
10. "Other" = 4%
11. "Useful tactic to gain time (delay final hearing)" = 0.7%

Fabre v. Marin: Its Effect on Florida Tort Law—July 1, 1994 to Present

John F. Romano*
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TABLE OF CONTENTS

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I. INTRODUCTION

The so-called *Fabre/Messmer*[1] line of cases constitutes perhaps the most poorly reasoned and politically biased decisions in Florida jurisprudence. In these cases, Florida courts seem to abandon fundamental principles of fairness which provide that only those who are given fair notice and opportunity to respond can be legally blamed for a wrongful act. The following article outlines both the *Fabre* and *Messmer* decisions, and analyzes those decisions from the defense and plaintiff perspectives. Next, the article surveys subsequent decisions. It notes the impact of these cases on our judicial system and the probable resulting negative public perception of the judicial system's ability to be fair and just.

II. PRECEDENT FLORIDA CASES

A. *Messmer Came First*

The first in this historic line of cases was decided by the Fifth District Court of Appeal in *Messmer v. Teacher's Insurance Co.*[2] That case arose out of a car crash in which the plaintiff was a passenger in a car driven by her husband. The defendant truck driver was uninsured, but the plaintiff had uninsured motorist coverage in the amount of $300,000. The uninsured motorist claim was submitted to arbitration as required by the terms of the Teacher's Insurance Company ("Teacher's") policy.[3]

The arbitrators found that the defendant was 20% responsible for causing the accident. They awarded the plaintiff total economic damages in the amount of $52,455, and total noneconomic damages in the amount of $200,000.[4] Plaintiff's husband was not a party to the lawsuit, either as a defendant or as a third party defendant, under Florida's then existing law of contribution.[5] The policy, which also insured the husband, contained an exclusion for liability claims by members of the insured's household, so there was no liability insurance coverage for plaintiff's injuries caused by her husband.[6] Notwithstanding her husband's absence of liability coverage,

1. Fabre v. Marin, 597 So. 2d 883 (Fla. 3d Dist. Ct. App. 1992), *quashed by* 623 So. 2d 1182 (Fla. 1993); Messmer v. Teacher's Ins. Co., 588 So. 2d 610 (Fla. 5th Dist. Ct. App. 1991).
2. 588 So. 2d at 610.
3. *Id.* at 611.
4. *Id.*
5. *See* FLA. STAT. § 768.31(2)(f) (1987).
6. *Messmer*, 588 So. 2d at 611 n.1.

plaintiff's insurance policy did not provide coverage for her husband's negligence. The trial court's interpretation was affirmed.[7] The trial court and the Fifth District Court of Appeal and ultimately the Supreme Court of Florida failed to follow Florida's well-established rules of statutory construction.[8] There even appears to be an internal conflict within the court's own holding, when it states that "[t]he use of the word 'party' simply describes an entity against whom judgement is to be entered."[9] By its own holding, the court should not have considered plaintiff's husband as a party, since he was not an entity against whom judgment was or could have been entered.

Teacher's paid the economic damage award in full, plus costs.[10] But the trial court, interpreting Florida's law on apportionment of damages,[11] ruled that Teacher's only had to pay 20% of noneconomic damages.[12] The appellate court determined that "party" meant party to the incident, rather than party to the lawsuit.[13] This analysis, that the legislature intended to equate liability with fault, meant a wrongdoer could and should escape full

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7. *Id.* at 611.

8. Holly v. Auld, 450 So. 2d 217 (Fla. 1984), stated: "[w]hen the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Id.* at 219 (quoting A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931)). *Holly* stated that courts in the State of Florida are "without power to construe an unambiguous statute in a way which would extend, modify or *limit*, its express terms or its *reasonable and obvious implications.* To do so would be an abrogation of legislative power." *Holly*, 450 So. 2d at 219 (quoting American Bankers Life Assur. Co. of Fla. v. Williams, 212 So. 2d 777, 778 (Fla. 1st Dist. Ct. App. 1968)). *But see* City of Boca Raton v. Gidman, 440 So. 2d 1277, 1281 (Fla. 1983) (holding that statutes should be construed so as to ascertain and give effect to the intention of the legislature); State v. Webb, 398 So. 2d 820, 824 (Fla. 1981) (holding that legislative intent should be given effect regardless of whether such construction varies from statute's literal meaning).

9. *Messmer*, 588 So. 2d at 611.

10. *Id.*

11. FLA. STAT. § 768.81(3) (1987) provides:

> (3) APPORTIONMENT OF DAMAGES. - In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

Id.

12. *Messmer*, 588 So. 2d at 611.

13. *See id.*

responsibility to an innocent victim whenever it could share blame upon an entity absent from the proceedings. Such reasoning was flawed because it failed to consider Florida's law of contribution[14] in pari materia. Furthermore, the court failed to consider, or perhaps was not provided with, the argument that the legislative intent in abrogating part of the joint and several liability doctrine was based upon a belief that well-heeled tortfeasors were too often footing the bill for other tortfeasors *who were parties to the lawsuit* and could not pay their share of the damages.

Nevertheless, *Messmer* opened the door to allow the apportionment of liability on the verdict form to people or entities who were not parties to the lawsuit and were not given a chance to defend themselves by their accusers.

B. *Then There Was Fabre*

About seven months after the Fifth District Court of Appeal decided *Messmer*, a similar issue came before the Third District Court of Appeal in *Fabre v. Marin*.[15] In that case, the plaintiff was also a passenger in an automobile that was hit by another car. As in *Messmer*, plaintiff's driver was her husband. The plaintiff alleged that she was injured when the defendant's car ran plaintiff's car off the road and into a guardrail. Defendants were underinsured and so plaintiff sued both Fabre and her own uninsured/underinsured carrier, State Farm Mutual Automobile Insurance Company ("State Farm"). The jury found plaintiff's husband 50% liable and the defendant 50% liable, and awarded total damages of $12,750 for economic losses and $350,000 for noneconomic losses.[16] The court entered judgment against both defendants (the Fabres and State Farm) for the total amount of the damages, $362,750.[17] Defendants filed several post-trial motions, but the salient one was a motion to reduce plaintiff's recovery by 50%, the amount of fault attributed to the defendants. The trial court denied the motion.[18]

The Third District Court of Appeal agreed the case was factually indistinguishable from *Messmer* but declined to adopt *Messmer's* holding.[19] The *Fabre I* court concluded that section 768.81(3) of the *Florida Statutes* was in fact ambiguous with regard to the meaning of the word "party." The

14. *See generally* FLA. STAT. § 768.31 (1987).
15. 597 So. 2d 883 (Fla. 3d Dist. Ct. App. 1992) ("*Fabre I*").
16. *Id.* at 884-85.
17. *Id.*
18. *Id.* at 885.
19. *Id.*

court noted that the legislature did not define the term, and that the word could in fact have three possible meanings.[20] They declined to adopt the definition that the word "party" could include non-parties to the lawsuit, since subsection three of the relevant statute requires the trial court to enter judgment against liable parties and the court could not have jurisdiction to enter judgment against non-parties.[21]

Although the *Messmer* and *Fabre I* courts both applied the same standards in analyzing their respective cases, the Third District Court of Appeal considered and applied fundamental rules of statutory construction to give full force and effect to all statutes whenever possible.[22] The *Fabre I* court, in an in-depth review, also fully considered the comparative fault statute[23] and the doctrine of interspousal immunity.[24] The court stated that sections 768.81(2) and 768.81(3) of the *Florida Statutes* revealed that the legislative language consistently reduced claimant's recovery only as a result of the claimant's own fault.[25] The *Fabre I* court, unlike the *Messmer* court, took into account the history of Florida jurisprudence as well as the legislative history on the relevant issues.

Importantly, the *Fabre I* court defined intellectual honesty when it stated that "[w]hen the meaning of a statute is in doubt, a rational, sensible construction, avoiding unreasonable consequences, is favored."[26] Writing for a unanimous court, Judge Baskin declined to usurp the legislative function by adding to the statute, writing: "[i]n the absence of any language in subsection three reducing an innocent plaintiff's recovery, and in view of the statute's express provision of the measure by which to reduce a negligent claimant's award, we conclude that subsection three should not be applied to bar Mrs. Marin's recovery."[27] The case was then certified to the supreme court as being in conflict with *Messmer*.[28]

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20. *Fabre I*, 597 So. 2d at 885. The word could mean "1) persons involved in an accident; 2) defendants in a lawsuit; or 3) all litigants in the lawsuit." *Id.*

21. *Id.*

22. *See generally id.* at 885-86.

23. *Id.* (analyzing FLA. STAT. § 768.81(2), (3) (Supp. 1988)).

24. *Fabre I*, 597 So. 2d at 886.

25. *Id.* at 885.

26. *Id.* at 886 (citing Wakulla County v. Davis, 395 So. 2d 540 (Fla. 1981) and Radio Tel. Communications, Inc. v. Southeastern Tel. Co., 170 So. 2d 577 (Fla. 1964)).

27. *Id.*

28. *Id.*

C. *The Showdown*

The Supreme Court of Florida broke the tie on August 26, 1993 in its review of *Fabre v. Marin*.[29] Writing for the majority, Justice Grimes reviewed the facts and holdings of both *Messmer* and *Fabre I*.[30] The court then provided an overview of the historical doctrines of contributory negligence, joint and several liability, comparative negligence, and contribution among joint tortfeasors.[31] The court compared *Fabre*, in which the plaintiff was entirely innocent, to *Walt Disney World Co. v. Wood*.[32] In *Disney*, the jury found the defendant was only 1% negligent, a non-party to the lawsuit was 85% negligent and, most importantly, the plaintiff was 14% negligent.[33] Thus, the *Disney* plaintiff was both negligent *and was more negligent than the defendant*! However, the *Disney* court reasoned that section 768.81 of the *Florida Statutes* did not completely replace the concept of joint and several liability and that judgment should be entered against each party liable on the basis of that party's fault.[34] The *Disney* court never considered that Florida's contribution statute[35] and third party practice rule[36] allowed Disney to make the plaintiff's fiancé, the non-party, a defendant in the case, since it was Disney and not the plaintiff who felt the fiancé was at fault. Of course, no one will ever know whether apportionment would have been the same if Disney, the accuser, had been required to openly name the fiancé and provide a fair chance for a response, rather than accuse him behind his back. The court's opinion seems to presume that the results would have been the same. Therein lies the flawed reasoning. This concept flies in the face of centuries old tradition and experience of adversarial jurisprudence. That tradition holds as its fundamental principle that justice is best served when all sides have their say. Instead, Florida's high court allowed the defendant to point the finger of blame away from itself. It simultaneously placed the burden of suing all potentially liable entities upon the plaintiff, even if the plaintiff does not

29. *See generally* Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993) (reviewing *Fabre I*, 597 So. 2d at 883).

30. *Id.* at 1183-84.

31. *Id.* at 1184-85.

32. 515 So. 2d 198 (Fla. 1975).

33. *Fabre*, 623 So. 2d at 1185 (analyzing *Disney*, 515 So. 2d at 198).

34. *Disney*, 515 So. 2d at 201 (assessing Disney 86% of damages despite jury findings of non-party fiancé's 85% fault).

35. *See* FLA. STAT. § 768.31 (Supp. 1986).

36. FLA. R. CIV. P. 1.180.

believe those entities are liable. This requirement raises ethical concerns for plaintiff's counsel.

Interestingly, the *Fabre* court bolstered its position by saying that even if the statute was ambiguous, "[we] believe that the legislature intended that damages be apportioned among all participants to the accident."[37] But the court provided no basis for reaching that conclusion, such as references to legislative hearings or committee meetings. There was no legislative directive that the statute should be liberally construed to limit a defendant's liability. There was no reference to support further constriction of the joint and several doctrine beyond what the legislature had already done.

The court did make reference to a seven-year-old legislative finding which states the reasons why the legislature wanted comprehensive tort reform and would enact such reform themselves.[38] It would seem, then, that the court should not have added to or expanded the statute. Nevertheless, the law today is as follows: Any entity who is potentially liable may be blamed by a named defendant and may be placed on the verdict form for apportionment of liability, without being made a party to the lawsuit.

The supreme court's holding forces plaintiffs and their counsel into a conflict between themselves. For example, plaintiff's counsel is ethically bound to name only those defendants whom he or she believes in good faith to be liable, yet the *Fabre* decision by the Supreme Court of Florida forces counsel to name all potential entities the defense may use to avoid or reduce its own responsibility. As a result, plaintiff is forced to sue entities he or she may not believe liable. There is no doubt that the legislature has the right and the power to modify or eliminate joint and several liability. Likewise, it has the ability to prescribe apportionment among entities who are not parties to the lawsuit. And of course, the supreme court has the power to do as it did in *Fabre*. But where the legislature has expressly addressed the issue to the extent it thought necessary, the question is not whether the court could, but whether it should, expand the legislation beyond its strict meaning.

III. SURVEY OF FLORIDA CASES BETWEEN JULY, 1994 AND JULY, 1995

Florida courts have repeatedly confronted *Fabre/Messmer* party liability issues since the final disposition of the cases. The remainder of this article

37. *Fabre*, 623 So. 2d at 1185.

38. *Id.* (citing Tort Reform Insurance Act of 1986, ch. 86-160, § 2, 1986 Fla. Laws 695, 699 (codified at FLA. STAT. § 768.81 (Supp. 1986)).

surveys post *Fabre/Messmer* cases, focusing on the *Fabre/Messmer* issue of liability in each case and, perhaps, gives insight into the future of Florida decisions.

A. *First District Court of Appeal*

In *Department of Corrections v. McGhee*,[39] two felons escaped from the custody of the Department of Corrections ("DOC") while being taken to a doctor for an eye examination. The escapees fled from Florida to Alabama and then to Mississippi, where they later shot plaintiff's husband, a park ranger. Suit was filed against the DOC, alleging that the agency was negligent in its care, supervision and control of the felons and that, as a result of such negligence, the inmates escaped and thereafter caused the death of Robert McGhee, Jr., plaintiff's husband.[40]

The *Fabre/Messmer* issue in this case was whether the jury should be permitted to apportion noneconomic damages between negligent and intentional tortfeasors. In his concurring and dissenting opinion, Judge Ervin also discussed pertinent aspects of section 768.81 of the *Florida Statutes*.[41] He specifically pointed to the language of section 768.81(4):

> (b) *The section does not apply* to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.[42]

Judge Ervin notes that the DOC argued in the trial court that the felons, who were not named defendants, were partially at fault based upon their intentional and criminal conduct and, therefore, the jury should consider the various percentages of fault of all tortfeasors.[43] Mrs. McGhee took the position that DOC's claim for apportionment was barred by the provisions of section 768.81(4)(b) of the *Florida Statutes* since the felons committed intentional acts.[44]

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39. 653 So. 2d 1091 (Fla. 1st Dist. Ct. App. 1995) (Ervin J., concurring in part and dissenting in part).

40. *Id.* at 1091-92.

41. *Id.* at 1099-1101; *see generally* FLA. STAT. § 768.81 (1993).

42. *McGhee*, 653 So. 2d at 1099-1100 (citing FLA. STAT. § 768.81(4)(a) (1989)).

43. *Id.* at 1100.

44. *Id.*

Judge Ervin reasoned, agreeing with the decision of the trial court, that since plaintiff's action against the DOC was based on negligence, plaintiff's argument must fail.[45] He specifically noted that, "[n]o action was brought by appellee on the theory of intentional tort."[46] Section 768.81 of the *Florida Statutes* requires a jury's consideration of each individual's "fault" contributing to an injured person's damages even if such person is not or cannot be a party to the lawsuit.[47] According to Judge Ervin:

> I consider that the comparative fault statute, in precluding the comparing of fault in any action based upon intentional fault, expressed an intent to retain the common law rule forbidding an intentional tortfeasor from reducing his or her liability by the partial negligence of the plaintiff in an action based on intentional tort. However, such exclusion has no applicability to an action, such as that at bar, based solely on negligence, and, consequently, the fault of both negligent and intentional tortfeasors may appropriately be apportioned as a means of fairly distributing the loss according to the percentage of fault of each party contributing to the loss. I would therefore affirm as to this issue.[48]

Wells Fargo Guard Services, Inc. v. Nash,[49] involved a plaintiff, Lucille Nash, who was robbed and pistol-whipped in the parking garage of Methodist Hospital in Jacksonville.[50] She sued defendant, a security guard service, for negligence. The *Fabre/Messmer* issue dealt with the verdict form. Defendant, Wells Fargo, moved to include the hospital, a non-party, on the verdict form. The trial court denied defendant's motion and the case was submitted to the jury with only the defendant appearing on the verdict form.[51]

In this decision, the First District Court of Appeal, following *Fabre*, held that the case must be reversed and that the hospital, a non-party, must be included on the verdict form, even though Nash had not included the hospital in the suit.[52] There was no discussion in this decision of the extent to which there was any "evidence" of fault on the part of the hospital.

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45. *Id.* at 1101.
46. *Id.*
47. *See* FLA. STAT. § 768.81 (1989).
48. *McGhee*, 653 So. 2d at 1101.
49. 654 So. 2d 155 (Fla. 1st Dist. Ct. App. 1995).
50. *Id.* at 156.
51. *Id.*
52. *Id.*

B. *Second District Court of Appeal*

In *Peterson v. Morton F. Plant Hospital Ass'n, Inc.*,[53] a wrongful death suit was filed alleging medical malpractice against a hospital and two of its employees, a nurse and a nurse midwife.[54] A Dr. Keller, who specialized in obstetrics and gynecology, was also a defendant. Before trial, Dr. Keller reached an informal settlement with no documentation. Plaintiff unsuccessfully moved in limine to exclude any evidence of the $250,000 settlement, and both the fact of the settlement and the amount of the settlement were disclosed to the jury during the trial.[55] Defense counsel stated in final argument:

> [T]hey have already received or will receive funds from Dr. Keller. When you couple that with the amount that they've received or are receiving from the government, it more than equals the amount of money [the plaintiffs' attorney] has asked you for for [sic] care and services. More, greater than.[56]

Later, the trial court instructed the jury that Dr. Keller had settled and the hospital was blameless for his actions. However, the court instructed the jury it could still assign Dr. Keller a percentage of liability regardless of any insurance coverage. The jury then returned a verdict for the hospital and its two nurses.[57]

The court treated Dr. Keller in this instance as a *Fabre* party. Nevertheless, the District Court of Appeal reversed this verdict and remanded the case for a new trial holding that the disclosure of the amount of the settlement clearly prejudiced the plaintiffs in this case.[58] "In many respects, the trial court allowed the defendants to treat Dr. Keller as both a party who had settled and as one who had not."[59]

In *Owens-Illinois, Inc. v. Baione*,[60] a wrongful death action, Baione's estate brought an action for damages against the manufacturer of asbestos products. The suit claimed that Baione's death was caused by his exposure to asbestos products during the course of his employment. The

53. 656 So. 2d 501 (Fla. 2d Dist. Ct. App. 1995).
54. *Id.* at 502.
55. *Id.* at 502.
56. *Id.*
57. *Id.*
58. *Peterson*, 656 So. 2d at 501.
59. *Id.* at 503.
60. 642 So. 2d 3 (Fla. 2d Dist. Ct. App. 1994)

Fabre/Messmer issue in this case was whether or not there was sufficient evidence to permit the apportionment of fault against non-parties to the suit, other manufacturers of the asbestos. The Second District Court of Appeal held that the evidence was insufficient and, therefore, the trial court judge correctly denied the manufacturer's request to have the jury make assessments of fault of non-party entities.[61]

In *Seminole Gulf Railway, Ltd. v. Fassnacht*,[62] plaintiffs, a retired couple, suffered injuries when their vehicle, driven by the husband, collided with defendant's train.[63] Plaintiffs brought a negligence suit and a suit for personal injury damages against the owner of the Seminole Gulf Railway. The jury verdict form directed the jury to consider the liability of defendant Seminole, the liability of the plaintiff husband, and the amount of noneconomic damages, if any. The jury found defendant and the plaintiff husband each 50% negligent and awarded plaintiffs $35,000 each for past and future noneconomic damages.[64]

Relying on section 768.81(3) of the *Florida Statutes*, Seminole moved to have Mrs. Fassnacht's award reduced by Mr. Fassnacht's percentage of comparative fault.[65] The Second District Court of Appeal ultimately held that Seminole's position was correct in accordance with the holding of *Fabre* and directed Mrs. Fassnacht's award be accordingly reduced.[66]

It should be noted that in a partially concurring and partially dissenting opinion, Judge Altenbernd concluded that the *Fabre/Messmer* issue had not been adequately preserved by the defendant in trial court.[67] Judge Altenbernd stated:

> The record does not reflect that the defendant asked for relief under section 768.81 until after the jury returned its verdict. In my opinion, a defendant should raise section 768.81 as an affirmative defense, just as defendants have always raised contributory or comparative negligence. A defendant should request jury instructions on this issue similar to the standard instructions for comparative negligence. . . . If a defendant wants the benefit of section 768.81, the jury should be told

61. *Id.*

62. 635 So. 2d 142 (Fla. 2d Dist. Ct. App. 1994) (Altenbernd, J., concurring in part and dissenting in part).

63. *Id.* at 143.

64. *Id.*

65. *Id.* at 144; *see also* FLA. STAT. § 768.81(3) (1989).

66. *Seminole Gulf*, 635 So. 2d at 144.

67. *Id.*

> about the effect that statute will have on its verdict, just as it is told about the effect of traditional comparative negligence.[68]

On a further review of the apportionment of damages issue, Judge Altenbernd noted that the majority's opinion awarded Mrs. Fassnacht only $17,500 since section 768.81(5) of the *Florida Statutes* does not apply to cases with damages of $25,000 or less.[69] Ironically, the plaintiff's recovery was smaller due to the larger jury award. Judge Altenbernd noted:

> [t]his result may seem logical and fair to the legislature, but I doubt it is the result that most jurors would anticipate. In assessing damages, a jury should have a general understanding of the overall ramifications of its verdict. This jury had no reason to anticipate that Mrs. Fassnacht's award would be 50% of what they actually awarded.[70]

C. *Third District Court of Appeal*

The wrongful death action in *Chesterton v. Fisher*,[71] involved a plaintiff who died of mesothelioma, an asbestos-related cancer, and the defendants, manufacturers and sellers of packing and gasket materials. Plaintiffs previously settled with approximately twenty-six manufacturers of asbestos-containing insulation. Although this case was reversed and sent back for a new trial on other grounds,[72] the court mentioned that *Fabre* was decided subsequent to the first trial.[73] The Third District Court of Appeal wrote:

> [a]t the time of trial, the trial court did not have the benefit of the Florida Supreme Court's decision in *Fabre v. Marin* . . . . Therefore, on remand if there is sufficient "evidence to consider the liability of other nonparties," the jury is to be instructed pursuant to Section 768.81(3), Florida Statutes (1993), and provided with jury instructions and a verdict form that permits the jury to apportion liability among all alleged tortfeasors.[74]

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68. *Id.*
69. *Id.* at 145; *see also* FLA. STAT. § 768.81(5) (1989).
70. *Seminole Gulf*, 635 So. 2d at 145.
71. 655 Fla. 2d 170 (Fla. 3d Dist. Ct. App. 1995).
72. *Id.* at 171.
73. *Id.* at 172.
74. *Id.* (citing W.R. Grace & Co. v. Dougherty, 636 So. 2d 746, 748 (Fla. 2d Dist. Ct. App. 1994)).

In *City of Homestead v. Martins*,[75] the Third District Court of Appeal held that the amount of a judgment against a defendant hospital could not exceed the percentage of liability apportioned against it by the jury.[76] The court held that pursuant to *Fabre*, it was error for the trial court to award an amount that exceeded the percentage of liability attributed to it by the jury.

The Third District Court of Appeal, in *Ashraf v. Smith*,[77] a medical malpractice case, followed *Fabre* by holding that a defendant physician's request to include a non-party hospital on the verdict form should have been granted.[78] The court ruled that if, at retrial, the jury determined the hospital was not a negligent cause of the plaintiff's death, then the original judgment against the defendant physician and the physician's protective trust fund would be reinstated.[79]

In *Schindler Elevator Corp. v. Viera*,[80] the wife of a man killed from an elevator shaft fall brought an action against the elevator maintenance company and Dade County, the elevator owner. The plaintiff privately settled with Dade County and went to trial against the elevator company. The elevator company, Schindler, requested that Dade County be listed on the verdict form for apportioning liability. The trial court denied the request and the jury only considered the liability of the elevator company and the deceased. The jury entered a verdict finding the elevator company 75% at fault and the decedent 25% at fault. On appeal, the Third District Court of Appeal held that reversal was required under *Fabre* and the jury should apportion liability among "all persons responsible for the accident,"[81] including Dade County.

D. *Fourth District Court of Appeal*

The plaintiff in *Yablon v. North River Insurance Co.*,[82] was injured in a car wreck. She and her husband privately settled with two tortfeasors, Ford Motor Company and Pompano Lincoln Mercury. At the time of the crash, plaintiff had insurance with North River, under a policy which contained benefits for uninsured/underinsured coverage. The policy provided that uninsured motorist ("UM") benefits would not apply if there

75. 645 So. 2d 187 (Fla. 3d Dist. Ct. App. 1994).
76. *Id.*
77. 647 So. 2d 892 (Fla. 3d Dist. Ct. App. 1994).
78. *Id.* at 893.
79. *Id.*
80. 644 So. 2d 563 (Fla. 3d Dist. Ct. App. 1994).
81. *Id.* at 564.
82. 654 So. 2d 1033 (Fla. 4th Dist. Ct. App. 1995).

was a settlement "without our consent."[83] Due to the settlements without the UM carrier's "consent," the lower court held, in a declaratory judgment action, that there was no UM coverage.[84] The crux of the case was really whether or not the nonconsensual settlement with these tortfeasors had somehow "prejudiced" the UM carrier.[85] In this instance, the appellate court held that plaintiffs had made a requisite showing of lack of prejudice to defeat coverage based, at least in part, on the *Fabre* decision.[86] With the abrogation of joint and several liability, North River would not be compromised by private settlements. They would still only be liable for their percentage share of liability.[87] Accordingly, the finding of "no coverage" was reversed.[88]

With regard to our discussion of *Fabre/Messmer* issues, *Brown v. City of Lauderhill*[89] assists us only in that it provides a further definition of a "party" under section 768.81(3) of the *Florida Statutes*. The court here was simply trying to determine whether or not a city is a real party in interest to various attorney's fee claims. The court noted that "often the term 'party' is recognized as including those who are real parties in interest."[90]

In *Bell South Human Resources Administration, Inc. v. Colatarci*,[91] a Southern Bell employee was injured while participating in a physical activities program sued the corporation operating the program for damages. Defendant appealed, arguing that the court erred in failing to include nonparty tortfeasors on the verdict form. Following *Fabre*, the court decided that failure to include nonparty tortfeasors on a verdict form required reversal of the plaintiff's verdict in this personal injury case despite plaintiff's contention that the defendant's proffer did not show sufficient evidence of negligence by nonparties.[92]

In *East West Karate Ass'n, Inc. v. Riquelme*,[93] a karate student who ruptured his spleen brought a negligence action against a karate association. On appeal, the karate association claimed that the trial court erred by not including the sparring partner's name to the jury on the verdict form.

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83. *Id.* at 1034.
84. *Id.*
85. *See id.* at 1035.
86. *Id.*
87. *Yablon*, 654 So. 2d at 1035.
88. *Id.* at 1036.
89. 654 So. 2d 302 (Fla. 4th Dist. Ct. App. 1995).
90. *Id.* at 303 (citing *Fabre*, 623 So. 2d 1182 (Fla. 1993) as an example).
91. 641 So. 2d 427 (Fla. 4th Dist. Ct. App. 1994).
92. *Id.* at 428.
93. 638 So. 2d 604 (Fla. 4th Dist. Ct. App. 1994).

Following *Fabre*, the Fourth District Court of Appeal agreed and reversed the case.[94]

E. *Fifth District Court of Appeal*

The plaintiff in *Wet 'n Wild Florida, Inc. v. Sullivan*,[95] was injured while pulling a drowning woman from a "wave pool." The complaint alleged negligence on the part of the lifeguard employees of defendant Wet 'n Wild. According to the plaintiff, if the employees had rescued the victim, the plaintiff would not have been injured. Wet 'n Wild took the position "that it had not breached any duty owed to Sullivan and that Sullivan was herself negligent and that the victim was negligent."[96] The *Fabre/Messmer* issue noted in this case was whether or not the trial court erred in not submitting the issue of the victim's negligence to the jury for its consideration.[97] The court decided that the jury should consider, and apportion accordingly, the relative negligence of all parties, including the drowning victim.[98]

A car wreck led plaintiff to sue in *DeWitt Excavating, Inc. v. Walters*.[99] In 1988, a DeWitt employee negligently directed Hashim to turn into the path of Walters' oncoming vehicle. Plaintiff Walters settled privately with Hashim and went to trial against DeWitt Excavating. The jury found the remaining defendant, DeWitt Excavating, 25% negligent. Consequently, DeWitt was held liable for the first $25,000 in damages and for 25% of the excess, after subtracting the settlement amount.[100] The jury found Hashim 75% negligent and plaintiff 0% negligent.[101]

The case was reversed and remanded holding that once damages exceed $25,000, the doctrine of joint and several liability is inapplicable to the action and, thus, a nonsettling defendant is responsible for only that portion of the entire noneconomic damages equivalent to the percentage of

94. *Id.* at 605.
95. 655 So. 2d 1171 (Fla. 5th Dist. Ct. App 1995).
96. *Id.* at 1172.
97. *See id.* at 1174.
98. *Id.*
99. 642 So. 2d 833 (Fla. 5th Dist. Ct. App. 1994).
100. *Id.* at 834.
101. *Id.* at 833.

fault.[102] Therefore the defendant was not jointly and severally liable for the first $25,000 in damages.[103]

Turner v. Gallagher[104] deals primarily with the 120-day service rule regarding service of a summons and complaint and whether or not the 120-day rule applies to the Department of Insurance in a sovereign immunity case. Here, the court looks to *Messmer* for guidance in defining the term "party."[105] Further, "the term 'defendant' unambiguously means a party named in a lawsuit against whom some type of relief or recovery is sought or who claims an interest adverse to the plaintiff."[106] The court held that the rule requiring service of process upon a defendant within 120 days after the filing of the initial pleading does not apply to the Department of Insurance in a negligence action/sovereign immunity action under the statute requiring service of process upon the Department of Insurance.[107]

F. *Supreme Court of Florida*

In the *Wells v. Tallahassee Memorial Regional Medical Center, Inc.*,[108] decision, considered by many legal scholars to be the most instructive, informative and well-reasoned decision on the *Fabre/Messmer* issue, the Supreme Court of Florida favorably resolved the confusion and conflict surrounding the treatment of liability settlements and setoffs after *Fabre*. This case involved a medical malpractice action in which the claimant settled before trial with defendant doctors for $300,000 and later went to trial against the defendant hospital. The jury determined claimant's total damages at approximately $575,000 and apportioned 90% of the fault to the hospital. The trial court denied the hospital's motion for a reduction in the judgment based upon the $300,000 already paid by the settling defendants.[109] The hospital appealed the trial court's decision and the First District Court of Appeal reversed, citing footnote three in *Fabre* and

102. *Id.* at 834.

103. *See id.* The opinion provides a step-by-step review of how to determine a damages award in similar situations. *DeWitt*, 642 So. 2d at 834-35.

104. 640 So. 2d 120 (Fla. 5th Dist. Ct. App. 1994).

105. *Id.* at 121. The *Messmer* court noted that "party" is a non-limiting term. *Id.* (citing *Messmer*, 588 So. 2d at 611).

106. *Turner*, 640 So. 2d at 121 (citing FLA. R. CIV. P. 1.210(a) and *Messmer*, 588 So. 2d at 610).

107. *Id.*

108. 20 Fla. L. Weekly S278 (June 15, 1995).

109. *Id.*

deviating from conflicting portions.[110] The First District Court of Appeal certified the following questions to the Supreme Court of Florida:

> (A) IS A NONSETTLING DEFENDANT IN A CASE TRIED UNDER SECTION 768.81(3) ENTITLED TO SETOFF OR REDUCTION OF HIS APPORTIONED SHARE OF THE DAMAGES, AS ASSESSED BY THE JURY, UNDER THE PROVISIONS OF SECTIONS 768.041(2), 46.015(2) OR 768.31(5)(a), BASED UPON SUMS PAID BY SETTLING DEFENDANTS IN EXCESS OF THEIR APPORTIONED LIABILITY AS DETERMINED BY THE JURY?
> (B) DOES THE RULE AS TO SETOFF APPLY EQUALLY TO BOTH ECONOMIC AND NONECONOMIC DAMAGES?[111]

Both certified questions were answered in the negative.[112]

In a decision authored by Chief Justice Grimes and concurred with by every other justice, the court held that the setoff statutes apply *only* to damages for which the parties are jointly and severally liable.[113] They do not apply to damages for which there is only proportional liability. Accordingly, there is no setoff for any portion of a settlement attributable to noneconomic damages.[114] The allocation of settlement proceeds between economic and noneconomic damages must be determined by the respective percentages ultimately fixed by the jury.

In a separate concurring opinion, Justices Wells and Kogan noted that this issue is but one of many problems arising from the *Fabre* decision and called for a reexamination of *Fabre*.[115] In another concurring opinion, Justice Anstead expressed his concern that the legislature had not acted to clear up these problems.[116]

III. CONCLUSION

At one point in time in the not-too-distant past history of tort law, any amount of contributory negligence completely barred a plaintiff's claim. As a result of the extreme harshness of this concept, the doctrine of joint and

110. *Id.* at S280 (citing *Fabre*, 623 So. 2d at 1186 n.3).
111. *Id.* at S278.
112. *Id.*
113. *See Wells*, 20 Fla. L. Weekly at S279.
114. *Id.* at S280.
115. *See id.* at S281 (Wells, J., and Kogan, J., concurring).
116. *See id.* (Anstead, J., concurring).

several liability developed slowly throughout the country. The theory of joint and several liability allows the plaintiff to collect the full amount of damages from any tortfeasor who caused the plaintiff's injuries. Members of the Florida Bar Association during these years discussed whether the doctrine of joint and several liability caused inequities. The matter was a choice: If there had to be a loss, the question was whether the loss should be borne by the guilt-free victim or by the wrongdoing tortfeasor. The obvious answer and the one uniformly chosen by the courts was that the cost should be borne by the parties sharing responsibility for the injury.

In the late 1960s and throughout the 1970s, statutes and case law developed the concept of comparative negligence. Replacing contributory negligence with comparative negligence eliminated what had been an illogical and antiquated bar to compensation. Eventually, defendants began to argue that the doctrine of comparative negligence was logically inconsistent with the common law doctrine of joint and several liability. In Florida, the doctrine of joint and several liability was retained. This was so until the enactment of the 1986 Tort Reform Act and subsequent interpretations of that Act, including the decision in *Fabre*. The *Fabre* case represents a policy decision that losses resulting from negligence of unknown or uninsured tortfeasors should be borne by the injured plaintiff, even when that plaintiff may be totally free from any fault or wrongdoing. Such a policy is abhorrent to the fundamentals of our system of justice.

Ocean Trail Unit Owners Ass'n, Inc. v. Mead: Democracy or Tyranny—The Supreme Court of Florida Properly Finds in Favor of Condominium Board

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TABLE OF CONTENTS

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I. INTRODUCTION

The concept of condominium form of ownership draws its earliest codification in the law to the Napoleonic Code of France.[1] Nearly two hundred years later, in the early 1960s, this ownership concept was introduced in Florida when the Florida Legislature enacted The Condominium Act, chapter 711 of the *Florida Statutes*.[2] Florida's Condominium Act, although establishing the basic framework of condominium law, was void of requirements for the operation and management of the condominium as well as of consumer protections for the condominium unit owner. Consequently, in the middle of the 1970s, the Condominium Act was significantly revised and renumbered as chapter 718, *Florida Statutes*.[3] These revisions added significant consumer protections for unit owners as well as enumerated comprehensive requirements for the operation and management of condominiums by their associations.[4]

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1. Sterling Village Condominium, Inc. v. Breitenbach, 251 So. 2d 685, 688 (Fla. 4th Dist. Ct. App. 1971), *cert. denied*, 254 So. 2d 789 (Fla. 1971). In addition, while not codified, the legal scholars trace the concept of condominium ownership to early Roman times. *Id.* *See* FLA. STAT. § 718.111(1)(a) (1993), which provides, with the exception of associations which were already in existence on January 1, 1977, that:

> The operation of the condominium shall be by the association, which must be a corporation for profit or a corporation not for profit . . . . The owners of units shall be shareholders or members of the association. The officers and directors of the association have a fiduciary relationship to the unit owners.

Id.

2. *See* FLA. STAT. § 711 (1963). Chapter 711 was subsequently repealed and replaced by chapters 718 and 719 of the *Florida Statutes*, which deal with condominiums and cooperatives, respectively. *See* 1976 Fla. Laws ch. 76-222.

3. FLA. STAT. §§ 718.101-718.622 (1993).

4. *See id.* § 718.102(1), (2) (stating that the purposes of chapter 718 are "[t]o give statutory recognition to the condominium form of ownership . . . [and] [t]o establish procedures for the creation, sale, and operation of condominiums").

Condominium law in Florida has developed into a sophisticated and orderly real property concept. Yet, the application of condominium law on ownership and enjoyment of real property has not been without its conflicts. There are compromises that must be made for the benefits of the condominium concept. The benefits of community living, which include sharing of maintenance responsibilities, ensuring quality common facilities and amenities, promoting community stability, and providing an organization with central responsibility in managing the operation of the condominium, are offset by the compromise that owners make with the degree of freedom and autonomy they forego to live in such a community.[5] The condominium association, an entity created by statute[6] and governed by its board of directors,[7] is given the difficult task of trying to maintain the delicate balance between preserving the common scheme for the benefit of all unit owners and protecting the rights of each unit owner.[8] The board of directors is typically composed of unit owners which itself has its advantages and disadvantages.

On the one hand, unit owners appreciate this democratic aspect, whereby a member of their own class can vote to make the choices that presumably the rest of the unit owners desire. On the other hand, unit owners who serve on association boards of directors often lack the expertise which would be desired of a person who represents others and owes them fiduciary duties. This observation, of course, neglects the increasingly prevalent power struggles which arise between unit owners as they attempt to gain control of an association. These conflicts were made evident in the *Ocean Trail* cases,[9] spanning over eight years of bitter litigation between the Ocean Trail Condominium Unit Owners Association and the unit

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5. *See* Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180 (Fla. 4th Dist. Ct. App. 1975). The court in *Hidden Harbour* stated:

> It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.

Id. at 181-82.

6. *See* FLA. STAT. § 718.104.

7. *See id.* § 718.111.

8. Aquarian Found., Inc. v. Sholom House, Inc., 448 So. 2d 1166, 1168 (Fla. 3d Dist. Ct. App. 1984); Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d 637, 640 (Fla. 4th Dist. Ct. App. 1981).

9. Ocean Trail Unit Owners Ass'n, Inc. v. Levy, 489 So. 2d 103 (Fla. 4th Dist. Ct. App. 1986); Mead v. Ocean Trail Unit Owners Ass'n, Inc., 638 So. 2d 963 (Fla. 4th Dist. Ct. App. 1993), *quashed by* 650 So. 2d 4 (Fla. 1994).

owners. In a surprising (to some), albeit logical interpretation of the Florida Condominium Act, the Supreme Court of Florida held that the unit owners who had prevailed in their suit against the association were responsible for the association's attorney's fees in defending the suit because the attorney's fees constituted a common expense.[10] Before all was said and done, more than one million dollars in attorney's fees were incurred between the two sides with many residents spending much of their retirement savings in the process.[11]

This comment reviews the *Ocean Trail* litigation in the context of Florida condominium law and analyzes the impact of the Supreme Court of Florida's comment-worthy decision. Part II provides a general overview of the relevant portions of the Florida Condominium Act, chapter 718 of the *Florida Statutes*, dealing with association organization and powers. Part III discusses the three appellate opinions issued in the *Ocean Trail* litigation. Part IV analyzes some of the possible implications that the Supreme Court of Florida's decision may have on condominium law and practice. Part V identifies some possible measures that could ameliorate the impact of the decision on unit owners, and Part VI concludes briefly.

II. CONDOMINIUM POWERS UNDER CHAPTER 718 OF THE *FLORIDA STATUTES*

The Condominium Act provides that the governing body of the condominium association may be elected with varying notice and election procedures and requirements.[12] As such, the condominium association is analogous to a quasi-government, applying democratic principles.[13] Since board members are democratically elected, owners' dissatisfaction may be heard by the results in the next board elections.[14] Another method by which dissident owners may display their disapproval of board action is by bringing a lawsuit against the association.

This latter remedy is derived from section 718.111 of the Condominium Act[15] which provides the association with the authority to sue as well as

10. *Ocean Trail*, 650 So. 2d at 8.

11. *See* De' Ann Weimer, *Condo War Over Ruling Protects Boards From Challenges*, PALM BEACH POST, Nov. 19, 1994, at 9B.

12. *See* FLA. STAT. § 718.112.

13. *Id.* §§ 718.111-.112.

14. *See* FLA. STAT. § 718.112(k) (providing for recall and removal of directors from office with or without cause by the vote or agreement of the majority of all voting interests, and prescribing the procedure to be followed).

15. *Id.* § 718.111.

be sued with respect to the exercise or nonexercise of its powers.[16] This authority necessarily contemplates that judgments may be granted and entered against the association.

A condominium association is treated like other profit or not for profit corporations[17] that own property. If a judgment against the association is not satisfied, then the property of the association would be subject to execution and levy. Therefore, by opting to bring a lawsuit against the association to challenge board action, owners must realize the implication that may arise if a judgment is entered in their favor.

Essentially, owners must be cognizant that they, as individuals, comprise the membership of the association, and thus, any action seeking monetary damages against the association amounts to bringing an action seeking monetary damages against themselves individually. The issue that ensues as a result of the membership of a condominium association winning a monetary judgment against the association is how such a judgment should be satisfied. A condominium association is unlike most other corporations since a condominium association does not operate a business that receives cash flow from sales or services; rather, for the most part, it obtains its

16. *Id.* § 718.111(3). Subsection 3 provides:

> The association may contract, sue, or be sued with respect to the exercise or nonexercise of its powers. For these purposes, the powers of the association include, but are not limited to, the maintenance, management, and operation of the condominium property. After control of the association is obtained by unit owners other than the developer, the association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest, including but not limited to, the common elements; the roof and structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving an improvement or a building; representations of the developer pertaining to any existing or proposed commonly used facilities; and protesting ad valorem taxes on commonly used facilities and on units; and may defend actions in eminent domain or bring inverse condemnation actions. If the association has the authority to maintain a class action, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action. Nothing herein limits any statutory or common-law right of any individual unit owner or class of unit owners to bring any action which may otherwise be available.

FLA. STAT. § 718.111(3).

17. *See id.* § 718.111(2) (providing that "[t]he powers and duties of the association include those set forth in this section and those set forth in the declaration and bylaws and chapters 607 [The Florida Business Corporation Act] and 617, as applicable, if not inconsistent with this chapter").

revenues exclusively from assessing its members.[18] As such, a judgment entered against the association because of improper board action would either be satisfied from the proceeds payable under an errors and omissions insurance policy (if any), assessments collected from the members, or the property owned by the association would be subject to execution and judgment.[19]

III. How One Association Bought and Paid for a Lawsuit

The three reported *Ocean Trail* cases demonstrate how the condominium form of ownership contains latent flaws which can manifest themselves in ways that, to some, may seem inequitable to the unit owners. One of its problems can be reduced to the following basic scenario. First, the association's board of directors decides to undertake some action or expenditure. Second, the unit owners challenge the association's authority to undertake such action, and the dispute proceeds to litigation. Third, one side prevails, incurring substantial attorney's fees in so doing.

If the prevailing party is the association, then, assuming the court does not award attorney's fees, a special assessment levied against the unit owners to pay for the association's attorney's fees does not seem so inequitable. In fact, section 718.303 of the *Florida Statutes* currently provides for an award of reasonable attorney's fees to the prevailing party in suits between an owner and an association.[20] It is not uncommon for the prevailing party in litigation to seek payment of its fees and costs from the losing party and, most likely, the association will recover its attorney's fees from the unit owners who lost the litigation. However, if the unit owners are the prevailing party and seek payment of their fees through the association, they will likely end up writing themselves a check because the unit owners fund the association. Section 718.303(1) currently provides that a unit owner who prevails in an action against an association is entitled to reimbursement for special assessments levied by the association to pay its litigation expenses.[21] It is unclear how or whether section 718.303(1)

18. *Id.* § 718.115(2) (stating that "[f]unds for the payment of common expenses shall be collected by assessments against unit owners in the proportions or percentages provided in the declaration"). *See also id.* § 718.103(7) (defining "common expenses" as "all expenses and assessments which are properly incurred by the association for the condominium").

19. This note will not address the possibility of instituting any malpractice actions or claims against any party who might have given the board of directors incorrect or improper advice which might have led to the judgment granted against the association.

20. Fla. Stat. § 718.303(1).

21. *Id.* § 718.313(1).

would be applied when the unit owners as a class prevail in a suit against their association or when a substantial majority of the unit owners prevail or even when a significant number of unit owners prevail; this issue is discussed in Part IV A of this comment, *infra*. At the time that the *Ocean Trail* litigation commenced, section 718.303(1) did not include its current provision entitling a prevailing unit owner to reimbursement for litigation assessments.

Furthermore, the association has the power to levy and enforce special assessments to pay judgment liens on the association.[22] If the litigation expenses are not paid to the association, a claim of lien would probably be the next step for the unpaid parties. Thus, regardless of whether the unit owners win or lose in litigation against their own association, they will end up paying for both sides' attorney's fees.

In *Ocean Trail Unit Owners Ass'n, Inc. v. Levy*,[23] the unauthorized act was a land purchase, and the association's attorney's fees, which the unit owners ended up paying, totaled approximately $194,000.[24] In retrospect, one has to wonder whether the unit owners would have been better off not contesting the board's action. At least then they would have had a real property asset to show for their special assessment payments. The owners must now realize that the price of democracy is high.

A. *Ocean Trail Unit Owners Ass'n, Inc. v. Levy*

On March 7, 1985, at a general meeting, the Ocean Trail Unit Owners Association, the master association for the five building complex known as Ocean Trail Condominium, took control of the association's board of directors from the developer, Campeau Corporation Florida.[25] The first owner-board of directors was elected, and within a week the trouble began. On or about March 13, 1985, the newly-elected five-member board entered into a written contract to purchase a parcel of land adjoining the condominium complex.[26] The parcel was owned by Campeau and was originally intended to be the site of a sixth condominium building, but Campeau later

22. *See id.* § 718.111(4) (granting associations the power to make and collect assessments and to lease, maintain, repair, and replace the common elements); *id.* § 718.115(2) (granting associations the power to make assessments to pay common expenses). A judgment lien against the association as an entity would be a common expense.

23. 489 So. 2d at 103.

24. *See id.* at 103-04.

25. *Id.* at 103.

26. *Id.* at 103-04.

decided not to build a sixth building.[27] The board sought to add the parcel to the condominium complex.[28] The association's counsel advised the board of directors that because Ocean Trail Unit Owners Association was a homeowners' association and not a condominium association, it had authority to purchase property without bringing the matter to a vote of the unit owners;[29] furthermore, the board of directors was advised that under the association's bylaws and declaration it could levy a special assessment to fund the purchase without unit owner approval.[30] Relying on this advice, the association, based solely upon a vote of the board of directors, entered into the $914,000 contract without taking any formal vote of the unit owners.[31] The board made a special assessment to fund the purchase, and each of the 602 units in the complex was assessed $1518.44.[32] This transaction was closed within two weeks, on March 25, 1985.[33]

Several owners challenged the board's action on grounds that the board had no authority to undertake the purchase without bringing the matter to a vote of the owners.[34] The articles of incorporation and the bylaws of the association permitted the purchase of additions to the common elements only in accordance with the declaration of condominium.[35] However, the declaration of condominium of each building in the complex was silent on the association's power to purchase real property.[36] The owners sued the association and the developer, seeking a declaratory judgment regarding the authority of the association to enter into the agreement to purchase land, and to rescind the agreement.[37] The Circuit Court in and for Palm Beach County granted the plaintiff owners partial summary judgment on their claim for a declaratory judgment, holding that the purchase of the adjoining parcel

27. *Id.* at 104. *See also* Petitioner's Initial Brief at 3, *Ocean Trail Unit Owners Ass'n v. Mead*, 650 So. 2d 4 (Fla. 1994) (No. 91-00350).

28. Petitioner's Initial Brief at 3, *Ocean Trail* (No. 91-00350).

29. This article will not address the question of whether the association should have been governed by the current version of the Condominium Act, chapter 718 of the *Florida Statutes*, which was amended subsequent to the association's 1985 purchase of the subject parcel.

30. Petitioner's Initial Brief at 3, *Ocean Trail* (No. 91-00350).

31. *Ocean Trail*, 489 So. 2d at 104.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Ocean Trail*, 489 So. 2d at 104.

37. *Id.*

"materially altered and modified the appurtenances to the Plaintiffs' units."[38] Under a 1984 change to section 718.110(4) of the *Florida Statutes*,[39] unanimous consent of the owners was required before the association could purchase the property.[40] The association appealed.

The Fourth District Court of Appeal affirmed per curiam the Palm Beach County Circuit Court's partial summary judgment for the individual owners. Judge Glickstein concurred specially, explaining the factual background of the case, and the reasons for the court's holding. Citing section 718.110(4) of the *Florida Statutes*, as well as *Beau Monde, Inc. v. Bramson*,[41] and *Tower House Condominium, Inc. v. Millman*,[42] Judge Glickstein stated that the association had no authority to enter into the purchase agreement without obtaining the unanimous approval of the owners.[43] The court also decided to wait until testimony was presented before ruling on the rescission claim.[44] Ultimately, the purchase was rescinded by the Palm Beach Circuit Court. Thus, the newly-formed condominium association had committed its first unauthorized act. More challenges by the owners were to follow.

B. *Mead v. Ocean Trail Unit Owners Ass'n, Inc.—The Fourth District Court of Appeal's Decision*

After the purchase of the adjoining parcel was rescinded, the association recovered $630,000 of its purchase price from the seller.[45] Some of

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38. *Id.*

39. FLA. STAT. § 718.110(4) (Supp. 1984). Section 718.110(4) provides:

> Unless otherwise provided in the declaration as originally recorded, no amendment may change the configuration or size of any condominium unit in any material fashion, materially alter or modify the appurtenances to the unit, or change the proportion or percentage by which the owner of the parcel shares the common expenses and owns the common surplus unless the record owner of the unit and all record owners of liens on it join in the execution of the amendment and unless all the record owners of all other units approve the amendment.

Id.

40. *Id.*

41. 446 So. 2d 164 (Fla. 2d Dist. Ct. App.), *review denied*, 453 So. 2d 43 (Fla. 1984).

42. 410 So. 2d 926 (Fla. 3d Dist. Ct. App. 1981).

43. *Ocean Trail*, 489 So. 2d at 104.

44. *Id.*

45. 638 So. 2d at 963. The original contract price was $914,000; it is not clear whether the association recovered all of its purchase money.

the owners sued to obtain refunds of the $1518.44 special assessments[46] which had been made to fund the rescinded purchase.[47] The association, apparently faced with a loss due to the rescinded purchase litigation, made a claim against the association's errors and omissions insurance carrier.[48] The claim was eventually settled for $275,000.[49]

After obtaining the proceeds of the rescission and the insurance claim settlement, the directors first paid their lawyers a fee of $175,000, as well as some other costs.[50] The owners who had sued and obtained judgments for a refund of the prior special assessment were paid from the balance left over.[51] The balance was insufficient to make refunds to all of the owners.[52] Because of this shortfall, the association made a special assessment of $500 to cover the refunds of the prior special assessment for the rescinded purchase.[53] The new special assessment was not well received by the owners, who again brought suit as a class, seeking a declaratory judgment that the $500 special assessment was unauthorized.[54] The owners later added a claim for breach of fiduciary duty by the directors in settling with the insurance carrier and also for its disbursement of the insurance proceeds.[55] The trial court granted judgment for the association, holding that the special assessment, the insurance settlement and the disbursement were proper and authorized by the articles of incorporation and the bylaws under the provisions for common expenses.[56] The owners appealed.

The Fourth District Court of Appeal reversed, holding that the $500 assessment was a direct product of the first unauthorized act of the association's directors, and therefore was just as unauthorized as the prior land purchase agreement.[57] The court stated:

> It is immaterial that this second assessment was not used to make the purchase itself, but instead merely to pay costs and expenses directly related to the fact of the purchase. It was a natural and entirely

46. *See Ocean Trail*, 489 So. 2d at 104.
47. *Mead*, 638 So. 2d at 963.
48. *Id.* at 964.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Mead*, 638 So. 2d at 964.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Mead*, 638 So. 2d at 964.

> foreseeable consequence of the directors' folly. Directors cannot be at once unauthorized to do some act and at the same time [be] authorized to impose assessments to pay for the consequences of the unauthorized act.[58]

The court also held that the disbursement of the $275,000 insurance settlement was improper because it reimbursed some, but not all, of the unit owners.[59] This violated section 718.116(9)(a) of the *Florida Statutes*, which provides that no unit owner may be excused from paying his share of common expenses unless all other unit owners are also proportionately excused.[60] The court questioned how the settlement could have been approved when it was insufficient to cover the attorney's fees and fully reimburse all unit owners for the prior assessment.[61]

The court explained that, were it to hold otherwise, it would, as a court of equity in a declaratory judgment action, be "allow[ing] persons who suffer from some unauthorized act to pay for the privilege of doing so."[62] Nevertheless, on motion for rehearing, the Fourth District Court of Appeal certified the question to the Supreme Court of Florida.[63] The supreme court was not persuaded by the reasoning of the district court of appeal.

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58. *Id.* The court cited Scudder v. Greenbriar C Condominium Ass'n, Inc., 566 So. 2d 359 (Fla. 4th Dist. Ct. App. 1990), and Rothenberg v. Plymouth No. 5 Condominium Ass'n, 511 So. 2d 651 (Fla. 4th Dist. Ct. App.), *review denied*, 518 So. 2d 1277 (Fla. 1987), for the proposition that the propriety of an assessment is tied to the purposes for which it is made, and that the purposes must be authorized by some power granted to the association. *Mead*, 638 So. 2d at 964. "To state it as simply and directly as we can, an association's power to impose assessments on unit owners for common expenses is limited to authorized expenses, and does not extend, as is the case here, to unauthorized acts by the directors." *Id.*

59. *Id.* at 964-65.

60. FLA. STAT. § 718.116(9)(a).

61. *Mead*, 638 So. 2d at 965. The court stated that the association could have done three things when faced with the shortfall from the insurance settlement: 1) renegotiate the attorney's fees; 2) reimburse all of the unit owners in full and partially pay the attorney's fees; or 3) pay the attorney's fees in full and reimburse the unit owners partially, but equally. *Id.*

62. *Id.* at 964.

63. *Id.* at 965.

C. *The Supreme Court of Florida's Decision*[64]

On November 10, 1994, the Supreme Court of Florida answered the following question certified by the Fourth District Court of Appeal:

> WHETHER A CONDOMINIUM ASSOCIATION CAN ENFORCE A SPECIAL ASSESSMENT IMPOSED TO PAY JUDGMENTS, ATTORNEY'S FEES AND COSTS INCURRED IN CONNECTION WITH A LAWSUIT BROUGHT BY UNIT OWNERS AGAINST THE ASSOCIATION IN WHICH THE ASSOCIATION'S PURCHASE OF REAL PROPERTY WAS INVALIDATED AS AN UNAUTHORIZED ACT AND SUBSEQUENTLY RESCINDED.[65]

The court answered the question "yes," quashing the decision of the Fourth District Court of Appeal and remanding with instructions to affirm the final judgment.[66] The court disagreed with the district court of appeal's holding that the $500 special assessment to cover the litigation costs incurred in rescinding the unauthorized land purchase and to partially refund the special assessment to purchase the land was not authorized.[67] Justice Wells stated that the Fourth District "erroneously ignore[d] that the special assessments were collected in order to pay valid judgments against the Association."[68] Under section 718.115(2) of the *Florida Statutes*, a condominium association is empowered to make special assessments against unit owners to pay for common expenses.[69] The court reasoned that because condominium associations may sue or be sued with respect to the exercise of their powers,[70] judgments may be entered against the association subjecting its property to execution and levy.[71] Protection of the condominium's common elements is a valid purpose for making special assessments. Furthermore, section 6.5 of Ocean Trail's declaration of condominium provided that liens upon the common areas shall be paid as

64. Ocean Trial Unit Owners Ass'n, Inc. v. Mead, 650 So. 2d 4 (Fla. 1994).

65. *Id.* at 5-6.

66. *Id.* at 6.

67. *Id.*

68. *Id.*

69. FLA. STAT. § 718.115(2). "Common expenses include the expenses of the operation, maintenance, repair, or replacement of the common elements, costs of carrying out the powers and duties of the association, and any other expense designated as common expense by this chapter, the declaration, the documents creating the condominium, or the bylaws." *Id.* § 718.115(1).

70. *Id.* § 718.111(3).

71. *Ocean Trail*, 650 So. 2d at 7.

a common expense.[72] The court held that the reasons for the judgment against the association were irrelevant; what mattered was the existence of judgment that would imperil association property to the detriment of all unit owners.[73] The court noted that "a unit owner's duty to pay assessments is conditional solely on whether the unit owner holds title to a condominium unit and whether the assessment conforms with the declaration of condominium and bylaws of the association, which are authorized by chapter 718, *Florida Statutes*."[74] Unit owners could not refuse to pay a valid assessment; their remedy for unauthorized actions by the association's directors consisted of voting them out of office or, if justified, bringing an action for breach of fiduciary duty.[75] The Supreme Court of Florida distinguished *Scudder*[76] and *Rothenberg*,[77] on which the Fourth District Court of Appeal based its decision, in that those cases merely determined whether a particular expenditure was proper, and did not involve "*lawful judgments* rendered against the association for unlawful expenditures."[78] With regard to the questioned insurance settlement, the court held that the settlement and subsequent disbursement did not require court approval, and was within the discretion of the association's directors.[79]

Justice Kogan concurred in part and dissented in part with the opinion.[80] Although he agreed with the majority's holding with regard to the propriety of the insurance settlement and disbursement, he noted that the effect of the court's ruling was to make unit owners who prevailed as plaintiffs in an action against the association pay their own judgment.[81] He agreed with the Fourth District Court of Appeal's logic that the association's board could not perform an unauthorized act and at the same time be authorized to impose assessments to pay for the consequences of the unauthorized acts.[82] Justice Kogan referred to a phrase in the definition of "common expenses," which the majority did not mention in its opinion: "[a]s noted by the district court, section 718.103(7), defines 'common expenses' as 'all expenses and assessments which are *properly incurred by*

72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. 566 So. 2d at 359.
77. 511 So. 2d at 651.
78. *Ocean Trail*, 650 So. 2d at 8.
79. *Id.*
80. *See id.* at 8 (Kogan, J., concurring in part and dissenting in part).
81. *Id.* at 9.
82. *Id.*

the association for the condominium.'"[83] According to Justice Kogan, the expenses for which the $500 special assessment was imposed were not common expenses because they were improperly incurred due to the association's unauthorized act.[84] He rejected the association's argument that the board of directors had acted in good faith, even though the board of directors based its action on advice of counsel when it committed the unauthorized act of purchasing the adjoining parcel. Justice Kogan found no such defense available under the Condominium Act.[85]

Justice Kogan referred to the 1991 amendment of section 718.303(1)(e), which although inapplicable to the current case because of its later effective date,[86] was consistent with his argument that once an association's act is challenged by a unit owner and is held to be unauthorized, the association has no right to enforce assessments against the successful owner to pay the litigation expenses incurred in defending the unauthorized act.[87] Section 718.303(1)(e), as amended, provides that a unit owner who prevails in an action against his condominium association has a right to reimbursement for any special assessments imposed by the association to fund the litigation.[88]

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83. *Ocean Trail*, 650 So. 2d at 8 (Kogan, J., concurring in part and dissenting in part).

84. *Id.*

85. *Id.*

86. Section 718.303(1) was amended by the Laws of Florida 1991, ch. 91-103, § 14, which became effective on April 14, 1992. *See* ch. 91-103, § 14, 1991 Fla. Laws 722, 743.

87. *Ocean Trail*, 650 So. 2d at 9 (Kogan, J., concurring in part and dissenting in part).

88. The current section 718.303(1) provides, in relevant part:

> (1) Each unit owner, each tenant and other invitee, and each association shall be governed by, and shall comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws and provisions thereof shall be deemed expressly incorporated into any lease of a unit. Actions for damages or for injunctive relief, or both, for failure to comply with these provisions may be brought by the association or by a unit owner against:
>
> (a) The association.
>
> (b) A unit owner.
>
> . . . .
>
> (d) Any director who willfully and knowingly fails to comply with these provisions.
>
> . . . .
>
> The prevailing party in any such action . . . is entitled to recover reasonable attorneys fees. A unit owner prevailing in an action between the association and the unit owner under this section, in addition to recovering his reasonable attorney's fees, may recover additional amounts as determined by the court to be necessary to reimburse the unit owner for his share of assessments

Justice Kogan interpreted the 1991 changes to section 718.303(1)(e) to mean that an association's assessments due to litigation over its actions would be properly incurred common expenses unless and until such time as the litigation results in a finding that the association's acts were unauthorized.[89] The majority's decision seems to contradict Justice Kogan's interpretation of the rights afforded to unit owners under section 718.303(1)(e). The majority opinion did not mention this section, and it is possible that the court's holding that unit owners must pay assessments to fund the association's litigation expenses could be limited in application to cases prior to the effective date of section 718.303(1)(e). This is probably not the correct view, however. Although the amended statute entitles a prevailing unit owner to a refund of an assessment to fund the association's litigation expenses, it does not preclude the unit owner's from being required to pay, in some form other than an assessment, for the association's expenses. As discussed further below, the association's litigation expenses are still common expenses, and the unit owners could be forced to either pay or lose their interest in the common elements through foreclosure.

IV. IMPLICATIONS

A. *If the Unit Owners Sue Their Association as a Class and Prevail, No One Will Be Left to Pay the Association's Legal Fees*

As mentioned in Part III of this comment, it is unclear how section 718.303(1) of the *Florida Statutes* would be applied in a situation where the unit owners as a class sue their association and prevail or when a significant number of unit owners sue and prevail. The statute's wording only refers to "[a] unit owner" as the party entitled to reimbursement for any special assessments levied by the association to fund its expenses of litigation.[90] If the entire class of unit owners was entitled to reimbursement for litigation expense assessments levied by their association, how would the association fund the reimbursement? If section 718.303(1) is applied literally, then there will be no one left to pay a special assessment for litigation expenses when the unit owners sue as a class instead of individually. Similarly, if a

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levied by the association to fund its expenses of the litigation. This relief does not exclude other remedies provided by law.

FLA. STAT. § 718.303(1) (1993).

89. *See id.*

90. *See id.*

large group of unit owners sues and prevails, should the few unit owners who were not plaintiffs bear the burden of paying all the litigation expenses? In such situations, the conflict between section 718.303(1) and section 718.116(9)(a) becomes apparent. Section 718.116(9)(a) provides that no unit owner may be excused from paying his share of common expenses unless all other unit owners are also proportionately excused.[91] It does not seem as though the two statutes can be reconciled. The logical, orderly system of condominium law breaks down at this point. The association is a corporate entity which is supposed to represent its constituent unit owners. When the unit owners as a class sue the entity that is supposed to be their representative, they are suing themselves. If the unit owners are exempt from paying the association's attorney's fees, the unpaid attorneys will have no alternative but to assert their claim by enforcing a lien against the association property, which would probably result in foreclosure of the property. If the association does not own any real property, the judgment could be levied and enforced against the association's bank account. Because the unit owners have a collective interest in the association property or the association's bank account, they will still end up paying for expenses incurred by the association. Thus, although section 718.303(1), if applied literally, would prevent the owners from paying in the form of a special assessment, it will not prevent the unit owners from paying in a different and less acceptable manner.

B. *Unit Owners Will Seek to Impose Personal Liability on Directors to a Greater Degree Than Before*

The Supreme Court of Florida's decision in *Ocean Trail* could be interpreted as a move to provide more protection for individual directors on the decisions they make, thereby removing one of the major disincentives to serving on condominium association boards. The association's power to make assessments to pay for the costs incurred in defending their actions, whether proper or not, allows directors to cover whatever losses are not paid by their insurers. However, unit owners, now realizing that they will ultimately have to pay for their victory if it is against the association, might begin to sue directors individually rather than as their representatives. Obviously, an action against a director may not be possible if the circumstances do not give rise to a claim for breach of fiduciary duty. Nevertheless, if that is the only way that unit owners can seek relief against what they perceive as wrongful acts by their association's board, suits seeking

91. *Id.* § 718.116(9)(a).

personal liability against directors can be anticipated. Most associations' articles of incorporation indemnify the officers and directors for their actions taken on behalf of the association unless such action was the result of gross negligence or willful misconduct. Assuming the same facts as in *Ocean Trail*, where the directors act on the advice of counsel, it is likely that the association would be obligated to indemnify the directors for their wrongful acts. Hence, the result is the same: the unit owners end up paying themselves.

V. POSSIBLE MODIFICATIONS TO MINIMIZE *OCEAN TRAIL*'S IMPACT ON UNIT OWNERS

A. *Increased Use of Arbitration as an Alternative to Suits Between Unit Owners and Their Associations*

Arbitration and other forms of alternate dispute resolution are becoming increasingly in vogue. Applied to disputes between unit owners and condominium associations, arbitration is a potential alternative which, while not eliminating the problem, would reduce the severity of potential assessments to cover litigation expenses. Disputes between the unit owners and their association should be submitted to binding arbitration using a procedure which is already in place for the recall of association board members[92] as well as for "internal disputes arising from the operation of the condominium among developers, unit owners, associations, and their agents and assigns."[93] Although the voluntary arbitration provision was already in place when the *Ocean Trail* litigation began, the parties did not make use of it. Had they done so, they perhaps could have avoided at least a good part of the total litigation expenses. Chapter 718 currently requires arbitration before a suit can be filed, such that the *Ocean Trail* dispute would, under current law, probably be subject to arbitration.

B. *Establish Mandatory Minimum Required Levels of Errors and Omissions Insurance*

As noted in *Mead*, the association's errors and omissions insurance was insufficient to cover the litigation costs incurred by the association.[94] Although the shortfall was arguably attributable to the association's decision

92. *See* FLA. STAT. §§ 718.112(k)(3), 718.1255 (1993).
93. *Id.* § 718.112(1).
94. *Mead*, 638 So. 2d at 964.

to settle for less than the full amount of its expenses, it is possible that the association would have incurred additional attorney's fees if forced to litigate its claim for coverage against the insurer. If a mandatory minimum level of errors and omissions insurance was required, such problems could be reduced if not avoided. This modification in condominium law should be implemented with the insurers providing for the defense of the association. Although requiring an increased amount of coverage would result in higher insurance premiums, which would be a common expense to be paid by the unit owners, the benefits of increased protection in a worst case scenario would more than offset this higher cost. It would also demonstrate fiduciary prudence on the part of the board of directors.

VI. CONCLUSION

The condominium form of real property ownership is intended to operate as a democracy. The association is the government. The board of directors is democratically elected by the owner constituency and is supposed to represent the owners' interests. Ideally, the system should provide for sharing of many amenities in the form of common elements which the unit owners might not be able to afford individually in exchange for the sharing of common expenses. In reality, however, the microcosm of condominium government mirrors the operation of larger-scale democracies: there are power struggles, and the governmental representatives are challenged when they lose touch with their constituency, exceed their authority, and abuse their "taxing and spending powers." The unit owners at the Ocean Trail Condominium learned all too well that the price of democracy is high when they challenged the unauthorized action of their representative association and its board of directors. The Supreme Court of Florida's decision in *Ocean Trail* may to some seem unfair toward unit owners. Nonetheless, the court's holding comports with the logic and letter of Florida's Condominium Act, although it raises a potential conflict with section 718.303(1). The severity of the unit owners' potential exposure can be reduced by taking various measures, but the fact of their ultimate common liability must be recognized as a basic concept underlying condominium law.

Latera v. Isle at Mission Bay Homeowners Ass'n: The Homeowner's First Amendment Right to Receive Information

TABLE OF CONTENTS

I. INTRODUCTION

The Fourth District Court of Appeal of Florida recently decided a case concerning the enforceability of a homeowner's association restriction against the installation of satellite dishes.[1] Specifically, the court addressed whether the restriction violates the First Amendment.[2] *Latera v. Isle at Mission Bay Homeowners Ass'n, Inc.*[3] involves two competing interests:

1. Latera v. Isle at Mission Bay Homeowners Ass'n, 655 So. 2d 144 (Fla. 4th Dist. Ct. App. 1995).
2. *Id.* at 145.
3. *Id.*

the rights of homeowners to have free access to information,[4] and the powers of homeowner's associations to establish and enforce rules regarding the "uses to which individually owned property may be put."[5] This article addresses whether Florida courts should enforce a private homeowner's association's restrictive covenant prohibiting the installation of satellite dishes on homeowner's property.

Part II of this article will explore the growth of the satellite industry. Next, Part III will provide an overview of the *Latera* case. Part IV will then discuss the validity of homeowner's association restrictions. Specifically, this section will address certain powers of the homeowner's association, and how courts determine whether homeowner's associations have exercised these powers in a reasonable manner. Part V will evaluate the reasonableness of the restriction prohibiting satellite dishes in the *Latera* case. Specifically, this section will analyze the differing arguments put forth by the homeowners and the homeowner's association in the *Latera* case. Finally, Part VI will evaluate the constitutionality of the homeowner's association's restriction prohibiting satellite dishes in the *Latera* case. Specifically, this section will discuss whether the right to receive information via a satellite dish is a fundamental right. This section also analyzes arguments of both the homeowners and the homeowner's association regarding whether there is sufficient state action for the homeowners in *Latera* to claim a constitutional violation.

II. GROWTH OF THE SATELLITE INDUSTRY

The number of satellite dishes being used in United States homes increased from an estimated 900,000 units in 1984 to approximately 2.8 million units in 1991.[6] Today, there are over 4.3 million home satellite units operating in United States homes, and system sales exceeded over 30,000 per month in 1993.[7] Congress facilitated this growth of home

4. U.S. CONST. amend. I.

5. *See* WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 12 (2d ed. 1988).

6. Ward White, *Home Satellite Dish Industry: A Brief Study of Growth and Development*, 34 HOW. L.J. 243, 243 (1991).

7. Brief of Amicus Curiae American Satellite Television Alliance In Support of Position of Appellant at 8, Latera v. Isle at Mission Bay Homeowners Ass'n, 655 So. 2d 144 (Fla. 4th Dist. Ct. App. 1995) (No. 93-2952) [hereinafter Brief of Amicus Curiae].

satellite dish use by encouraging the advancement of new technologies and services to the public.[8]

Modern satellite reception systems have the capability to receive a wide variety of program services. Satellites offer both educational and entertainment programming unavailable from any other source, including hundreds of domestic as well as international television and radio signals.[9] Within the last twenty years, satellites have "revolutionized the world's ability to communicate with itself."[10] Since cable systems have not fully utilized this programming, only by installing and maintaining a satellite dish antenna can one "realize the full potential of the communications revolution."[11] Although newer satellite dishes are smaller in design, the general size of dishes required to receive clear satellite signals ranges between eight and twelve feet in diameter.[12] Satellite transmissions are microwave signals that must travel in a straight line from transmitter to receiver.[13] Therefore, a direct, unobstructed line between the "orbiting communications satellites" and the home satellite dish antenna is vital for reception.[14] Accordingly, since location of the satellite dish can impair its effectiveness, factors such as topography, landscaping, or building obstructions can limit or govern a homeowner's placement of the dish.[15] Since satellite dishes can be quite large and are required to be placed outdoors, many homeowner's associations regulate or restrict the installation of satellite dishes for safety and aesthetic reasons.[16] Consequently, the home satellite industry has consid-

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8. *See* 47 U.S.C. § 157(a) (1988). The section provides:

> It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

Id.; *see also id.* § 701.

9. Brief of Amicus Curiae at 8, 9, 17, *Latera* (No. 93-2952).

10. *Id.* at 17.

11. *Id.*

12. Brief of Amicus Curiae at 9, *Latera* (No. 93-2952).

13. *Id.*

14. *Id.* at 10.

15. *Id.*

16. *See* Ross v. Hatfield, 640 F. Supp. 708, 709 (D. Kan. 1986); Portola Hills Community Ass'n v. James, 5 Cal. Rptr. 2d 580, 581 (Ct. App. 1992); Esplanade Patio Homes Homeowners' Ass'n v. Rolle, 613 So. 2d 531, 532 (Fla. 3d Dist. Ct. App. 1993) (directing lower court to enforce a valid restriction against satellite dishes in community); Killearn Acres Homeowners Ass'n v. Keever, 595 So. 2d 1019, 1022 (Fla. 1st Dist. Ct. App.

ered these concerns and "has made great strides in recent years in encouraging creative landscaping to reduce or eliminate aesthetic objections to satellite dish installations, and by developing products that camouflage the antennas or conceal them in other structures, such as patio furniture, that is commonplace and generally accepted in most communities."[17]

III. *LATERA V. ISLE AT MISSION BAY HOMEOWNERS ASS'N, INC.*

On August 15, 1991, Ken and Tina Marie Latera purchased a lot within the Isle at Mission Bay, a single family residential community which is one of ten subordinate communities organized under the control and authority of the Mission Bay Association.[18] Two officers of the Mission Bay Association assured the Lateras that they would be permitted to install a satellite dish on their property.[19] On July 22, 1991, the Lateras submitted plans for the installation of their satellite dish to the Mission Bay Design Review Committee and obtained oral approval prior to the purchase of their lot.[20] The Design Review Committee then gave the Lateras' plans an initial review and conditional approval on August 28, 1991.[21] The conditional approval required the Lateras to buffer the satellite dish with landscaping around the entire rear perimeter of the property and disguise the satellite dish as patio furniture.[22]

The Design Review Committee granted tentative written approval on May 1, 1992, and final written approval on August 19, 1992, as all the

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1992) (finding that restriction precluding satellite dish in side yard was not arbitrarily applied where the dish was visible from the front of the property and other homeowners installed satellites in their backyards); Prinzing v. Jockey Club of North Port Owners Ass'n, 483 So. 2d 833, 834 (Fla. 2d Dist. Ct. App. 1986) (affirming lower court's holding that a television satellite antenna dish "constitute[d] a 'structure' as contemplated by [the] deed restrictions"); Breeling v. Churchill, 423 N.W.2d 469, 470 (Neb. 1988).

17. Brief of Amicus Curiae at 10, *Latera* (No. 93-2952).

18. Appellants' Initial Brief at 1, *Latera* (No. 93-2952).

19. The Lateras were told that a satellite dish would be permitted on the Lateras' property "under certain design restrictions devised to insure the ascetic integrity of the Mission Bay community." *Id.* The Lateras were also told that the Master Association's (Mission Bay) Design Review Committee would administrate the matter pursuant to the Mission Bay Design Review Standards Board. *Id.*

20. *Id.* at 2.

21. *Id.*

22. The landscaping was to include six-foot ficus trees to preclude the satellite dish from being seen from any neighboring lots or the street. Appellants' Initial Brief at 2, *Latera* (No. 93-2952).

Design Review Committee's conditions had been satisfied.[23] Then on April 24, 1992, the Isle at Mission Bay Homeowners Association ("Isle"), notified the Lateras that they were in violation of an Isle covenant which prohibited the installation of television-receiving satellite dishes.[24] Consequently, the Isle's attorney notified the Lateras on October 14, 1992, that the Isle fined them $1000 for failing to remove the satellite dish.[25] Subsequently, on December 22, 1992, the Isle placed a claim of lien on the Lateras' property for the $1000 fine.[26] Finally, on February 1, 1993, the Isle filed suit to foreclose the lien and sought injunctive relief to enforce the Isle's restrictive covenant.[27]

A. *Statement of the Case*

The Lateras raised four affirmative defenses in their Answer to the Isle's Complaint.[28] The third affirmative defense alleged "that an absolute

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23. *Id.*

24. *Id.* at 3. Article eleven, section ten of the Isle's declaration of covenants, entitled, "Antennas," provides that "[n]o television or other outdoor antenna system or facility, shall be erected or maintained on any lot." Answer Brief of Appellee at 1, *Latera* (No. 93-2952) (emphasis omitted). Article eleven, section eighteen of the Isle's Declaration entitled, "Additional Restrictions", provides: "[a]dditional restrictions on the use of lots and the property generally are contained in the Master Declaration. In the event of any conflict between the restriction in this Declaration and those in the Master Declaration, the more restrictive restriction shall control." *Id.* (emphasis omitted). The Lateras only sought permission to install their satellite dish from the Mission Bay Master Association, when apparently they also needed the approval of the Isle. *Id.* at 2-3.

25. Appellants' Initial Brief at 3, *Latera* (No. 93-2952).

26. *Id.*

27. Answer Brief of Appellee at 7, *Latera* (No. 93-2952).

28. The first affirmative defense alleged was estoppel, laches, and unclean hands on the part of the Isle, as the Lateras went through great expense to seek and did receive approval from the Master Association's Design Review Committee. Appellants' Initial Brief at 4, *Latera* (No. 93-2952). In response to this defense, the Isle alleged that the Lateras:

> waived and/or were estopped to contest the application of Article XI, Section 10 of THE ISLE's Declaration, due to their failure to submit any plans for review or approval to THE ISLE and due to the fact that the Defendants knew, or should have known of the restriction contained in THE ISLE's recorded Declaration.

Answer Brief of Appellee at 8-9, *Latera* (No. 93-2952).

The second affirmative defense alleged was that the restriction was ambiguous in the context of the other governing documents, as the Isle's Declaration did not specifically address a restriction against satellite dishes, while the Master Association's documents

restriction was unenforceable as a matter of law," and that "the Isle's attempt to impose an absolute restriction without a balancing of the equities or hardships [was] unconscionable and therefore arbitrary, unreasonable and unenforceable."[29] The Lateras' fourth affirmative defense alleged "[c]onstitutional violations, including the Lateras' First Amendment right to free access to information, which the Isle's access to cable did not satisfy."[30] The Lateras also relied on a federal governmental policy to facilitate the use of satellite dishes.[31] However, in rejecting these defenses, the trial court granted the Isle's motion for summary judgment without any opinion.[32]

B. *Appellate Court's Decision*

On appeal from the final summary judgment order, the appellate court addressed the issue of "whether a restriction against the installation of satellite dishes violates the First Amendment."[33] The court rejected the First Amendment argument regarding the Lateras' rights to privacy and free access to information, reasoning that "the right to install a satellite dish has

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specifically discussed the acceptability of satellite dishes upon conditional approval provided certain design restrictions were complied with. Appellants' Initial Brief at 4, *Latera* (No. 93-2952).

29. *Id.* at 5 (emphasis omitted).

30. The other constitutional violation alleged concerned the Lateras' right to privacy. *Id.* (emphasis omitted).

31. *Id.*

32. *Id.* A thirty-minute hearing was held on the Isle's motion for summary judgment. Both parties submitted memoranda and the court reviewed the file, in addition to listening to argument of both counsel. Appellants' Initial Brief at 5, *Latera* (No. 93-2952).

33. *Latera*, 655 So. 2d at 145. The court also addressed the issue of "whether a satellite dish is an 'antenna' within the meaning of the covenant." *Id.* at 144-45. The court rejected the Lateras' argument that a satellite is different than an antenna because a satellite only receives microwaves, whereas an antenna can receive or transmit electromagnetic waves. *Id.* at 145. Rather, the court ruled that there was no valid difference between a satellite dish and an antenna, and thus held that a satellite dish is an "antenna" within the meaning of the covenant. *Id.* (citing *Breeling*, 423 N.W.2d at 471 (holding restriction prohibiting antennas includes satellite dish)). The *Breeling* court also held that a homeowner's claim that enforcement of a restrictive covenant abridges the First Amendment right of freedom of speech is without merit. *Breeling*, 423 N.W.2d at 470. The *Latera* court also cited DeNina v. Bammel Forest Civic Club, Inc., 712 S.W.2d 195, 198 (Tex. Civ. App. 1986) and Gunnels v. North Woodland Hills Community Ass'n, 563 S.W.2d 334, 338 (Tex. Civ. App. 1978). *Latera*, 655 So. 2d at 145.

not been recognized as a 'fundamental right.'"[34] Accordingly, the court stated:

> [a]s the Supreme Court [of the United States] has consistently held, a policy which does not affect a fundamental right is accorded a "strong presumption of validity," and such policy must be upheld against a constitutional challenge "if there is any reasonably conceivable state of facts that could provide a rational basis" for such a policy.[35]

The appellate court also found no merit in the Lateras' argument that the covenant was unreasonably or arbitrarily applied.[36] Therefore, the appellate court affirmed the final summary judgment order which required the Lateras to take down their satellite dish and enjoined them from further violating the Isle's restrictive covenant prohibiting satellite dishes.[37]

IV. VALIDITY OF HOMEOWNER'S ASSOCIATION RESTRICTIONS

Florida has a large amount of community association development. Thus, Florida courts are continuously faced with dilemmas concerning the enforceability of homeowner's association's restrictions regulating the use of homeowner's property.[38] The interests of the association in maintaining the integrity of the community and the market value of homes within the community often conflict with the interests of the homeowners within the association.[39] Usually the interests of the homeowners include the desire

34. *Id.* at 146 (citing Burson v. Freeman, 504 U.S. 191 (1992) (discussing the right to free speech); Zablocki v. Redhail, 434 U.S. 374 (1978) (discussing the right to marry); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (discussing the right to procreate)). The court in *Latera* distinguished Gerber v. Longboat Harbour North Condominium, 724 F. Supp. 884 (M.D. Fla. 1989) (involving a covenant abridging right to free speech), *vacated in part*, 757 F. Supp. 1339 (M.D. Fla. 1991) and Franklin v. White Egret Condominium, Inc., 358 So. 2d 1084 (Fla. 4th Dist. Ct. App. 1977) (involving covenant abridging right to marry and procreate on the basis that the rights involved in these cases have been regarded as "fundamental rights"), *aff'd*, 379 So. 2d 346 (Fla. 1979).

35. *Latera*, 655 So. 2d at 146 (citing Heller v. Doe, 113 S. Ct. 2637, 2642 (1993)).

36. *Id.* at 145.

37. *Id.*

38. *See* HYATT, *supra* note 5, at 3.

39. *See* Jeffrey A. Goldberg, Note, *Community Association Use Restrictions: Applying the Business Judgment Doctrine*, 64 CHI.-KENT. L. REV. 653, 654 (1988).

to freely use and enjoy their property without any "unnecessary and burdensome interference" by the association.[40]

A. *Powers of the Homeowner's Association*

A simple decision to use one's property as he or she desires can become complicated when the property is within the confines of a community association.[41] The community association is empowered by a recorded declaration of covenants, conditions, restrictions,[42] and/or association bylaws[43] to impose restrictions on the use and occupancy of property.[44] Community association covenants or rules address typical public concerns such as the maintenance of common areas and facilities, common services, architectural standards, and appropriate maintenance by individual property owners.[45] In addition to these concerns, homeowner's associations may also attempt to regulate private aspects of the lives of association members.[46]

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40. *See id.*

41. A community association is a generic term used to describe all forms of mandatory membership in a housing association. HYATT, *supra* note 5, at 10. *See also* FLA. STAT. § 468.31(1) (1993). The individual unit owners automatically become members subject to the association's procedures and powers upon purchase or conveyance of the property unit. HYATT, *supra* note 5, at 10. Common types of community associations include homeowner's associations and condominium associations. *See id.* at 2, 13, 19. The major difference between condominium and homeowners' associations is the ownership of common property, or those parts of the community other than the individually owned homes, units, or lots. *Id.* at 20. Under a condominium association, the common property is owned in common by all the unit owners, while under a homeowner's association the association has title to the common property and the property owners have membership interests in the common property. *Id.* A second difference is that under Florida law, condominium associations are governed by different legislation than homeowner's associations. *See* Ch. 95-274, § 52-63, 1995 Fla. Sess. Law Serv. 1882, 1998-2005 (West) (codified at FLA. STAT. § 617.302-312) (governing homeowner's associations). *See also* FLA. STAT. §§ 718.101-718.1255 (1993) (governing condominium associations).

42. The declaration is the basic creating document in a community association. HYATT, *supra* note 5, at 356. This document may include plans for development and ownership, proposed operation methods, and rights and responsibilities of owners within the association. *Id.* Terms of the declaration are recorded in the land records and, therefore, continue to apply to each subsequent property owner. *Id.* at 357.

43. The association bylaws usually provide rules and procedures for operating and governing the association. *Id.*

44. *See id.* at 12.

45. Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 472, 473 (1985).

46. *Id.*

At times, though, it is permissible for the association to regulate private aspects of the lives of association members in order for the association to fulfill its responsibilities.[47] Associations have a broad range of responsibilities, which may include: overall management of the land and community; providing repair services and maintenance for streets, parks, lighting systems, and recreational facilities; and employing appropriate means of security.[48] Also, the documents creating the association usually include standards for architecture and the environment, as well as a system to establish and enforce these standards, which reflect the aesthetics of the community.[49] Therefore, when the association properly performs these duties, the association preserves the nature and character of the development. Consequently, homes within a community association are likely to be worth more.[50] Many homeowners are enticed by the assurance and confidence of a homeowner's association.[51] However, homeowners often learn that the restrictions homeowner's associations establish sometimes prove to be unreasonable or serve no useful purpose to association values.[52]

B. *Test for Reasonableness*

When evaluating whether the interests of the homeowner's association or the interests of the individual property owner should prevail, a starting point is the realization of the proposition set forth in *Sterling Village Condominium, Inc. v. Breitenbach*.[53] The court noted that "[e]very man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others."[54] Consistent with this principle, the Supreme Court of Florida has

47. *See id.* at 473-74.

48. HYATT, *supra* note 5, at 12-13.

49. *Id.*

50. *Gunnels*, 563 S.W.2d at 338.

51. *Id.*

52. *See James*, 5 Cal. Rptr. 2d at 582; White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346, 352 (Fla. 1979); Harbour Watch Homeowners Ass'n v. Derderian, 618 So. 2d 315, 316 (Fla. 2d Dist. Ct. App. 1993); Kies v. Hollub, 450 So. 2d 251, 255 (Fla. 3d Dist. Ct. App. 1984); Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d 637, 640 (Fla. 4th Dist. Ct. App. 1981); Voight v. Harbour Heights Improvement Ass'n, 218 So. 2d 803, 806 (Fla. 4th Dist. Ct. App. 1969).

53. 251 So. 2d 685, 688 (Fla. 4th Dist. Ct. App.), *cert. denied*, 254 So. 2d 789 (Fla. 1971).

54. *Id. See also Basso*, 393 So. 2d at 638-39. Although these cases involve condominium associations, they can be analogized with cases involving homeowner's

acknowledged the need for reasonable restrictions relating to the use, occupancy, and transfer of units in order to protect the interests of other unit owners.[55] Courts have often referred to these principles when they have ruled on the enforceability of various community association restrictions limiting the free use and enjoyment of property subject to the declarations of the associations.[56]

Although the Florida courts have never ruled on the validity of a private covenant prohibiting the installation of a satellite dish, they have reviewed a broad range of covenants. These covenants include: age restrictions;[57] restrictions against replacing screen enclosures with glass;[58] restrictions against having pets;[59] restrictions prohibiting horses, detached barns, or wire fences;[60] restrictions against displaying "for sale" signs;[61] restrictions against parking commercial vehicles in uncovered streets or driveways;[62] restrictions against construction of tennis court lighting,[63] a

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associations, as both homeowner's associations and condominium associations are types of community associations. *See* HYATT, *supra* note 5, at 2. Likewise, both the Lateras and the Isle cited cases involving condominium associations in support of their arguments. Although condominium associations and homeowner's associations are governed by different statutes, the associations are treated similarly under Florida law. *See supra* note 41. However, homeowner's associations are not as heavily regulated as condominium associations. *See supra* text accompanying note 41.

55. *Franklin*, 379 So. 2d at 350 (finding condominium restriction prohibiting residency of children under twelve enforceable if not arbitrarily and selectively applied).

56. *Basso*, 393 So. 2d at 638-39.

57. *See Franklin*, 379 So. 2d at 351. The court asserted that age restrictions are enforceable as a "reasonable means to accomplish the lawful purpose of providing appropriate facilities for the differing housing needs and desires of the varying age groups." *Id.* Furthermore, the court acknowledged that age restrictions can not be used arbitrarily or unreasonably. *Id.*; *see also* Constellation Condominium Ass'n v. Harrington, 467 So. 2d 378, 383 (Fla. 2d Dist. Ct. App. 1985) (upholding age restriction not unreasonably or selectively applied); Coquina Club, Inc. v. Mantz, 342 So. 2d 112, 114 (Fla. 2d Dist. Ct. App. 1977).

58. *See, e.g.*, *Breitenbach*, 251 So. 2d at 688 (upholding requirement of association approval to substitute glass for screen because the alteration is material and substantial).

59. *See, e.g.*, Wilshire Condominium Ass'n v. Kohlbrand, 368 So. 2d 629, 631 (Fla. 4th Dist. Ct. App. 1979) (holding that "a restriction against the replacement of dogs is reasonably consistent with principles that promote the health, happiness and peace of mind of unit owners living in close proximity"); *see also* Pines of Boca Barwood Condominium Ass'n v. Cavouti, 605 So. 2d 984, 985 (Fla. 4th Dist. Ct. App. 1992).

60. *See, e.g.*, James v. Smith, 537 So. 2d 1074, 1078 (Fla. 5th Dist. Ct. App. 1989) (upholding restrictive covenants).

61. *See, e.g.*, *Derderian*, 618 So. 2d at 316 (affirming that prohibition against "for sale" signs places unlawful burden on homeowner's right to sell property).

62. *See* Cottrell v. Miskove, 605 So. 2d 572, 573 (Fla. 2d Dist. Ct. App. 1992). The court upheld the restriction, reasoning that "[f]ailure to enforce the restriction would thwart

skateboard ramp,[64] or a swimming pool and deck;[65] restrictions requiring association approval before selling a unit;[66] restrictions against maintaining a shallow water well;[67] and restrictions prohibiting the use of alcoholic beverages in the clubhouse and adjacent areas.[68] In determining the validity of these various association use restrictions, the courts have split the cases into two categories. Cases involving the association declaration are classified as category one restrictions, and cases involving board of directors' rules are classified as category two restrictions.[69]

Courts view category one use restrictions with a strong presumption of validity, as they are considered "covenant[s] running with the land," which homeowners knew of or should have been aware of at the time they purchased their homes.[70] Other homeowners are entitled to rely on these restrictions, especially since these very same restrictions may have influenced their decision to purchase within the community.[71] Therefore,

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the clear intention of all property owners of the subdivision . . . who have purchased property in reliance upon the restrictive covenants." *Id.* at 574.

63. *See Kies*, 450 So. 2d at 256. The association covenants did not expressly prohibit a tennis court lighting system. *Id.* Moreover, there was no evidence showing the lighting system created a nuisance or was detrimental to community aesthetics. *Id.* The court further stated that "covenants imposed by a general plan, restraining the free use of real property, although generally valid and enforceable, are not favored in the law and will not be honored by the courts unless the restraint is within reasonable bounds." *Id.* at 255.

64. *See* Lathan v. Hanover Woods Homeowners Ass'n, 547 So. 2d 319, 320 (Fla. 5th Dist. Ct. App. 1989). The court allowed the homeowner to maintain the skateboard ramp due to conflict regarding whether architectural review board approval was necessary before erecting the skateboard ramp, since vague restrictions are construed in favor of the property owner in order to promote the free use of land. *Id.* at 321.

65. *See, e.g.*, Palm Point Property Owners' Ass'n v. Pisarski, 608 So. 2d 537, 538 (Fla. 2d Dist. Ct. App. 1992) (finding the property owners' association did not have standing to maintain an action to enforce the restrictive covenants), *review granted*, 618 So. 2d 1369 (Fla.), *decision approved*, 626 So. 2d 195 (Fla. 1993).

66. *See, e.g.*, Lyons v. King, 397 So. 2d 964, 965 (Fla. 4th Dist. Ct. App. 1981). The court asserted that the association did not arbitrarily or unreasonably invoke its right of first refusal since the prospective purchasers of the unit intended to lease the unit instead of occupying it. *Id.* at 967-68.

67. *Basso*, 393 So. 2d at 640. The court held that the association "failed to demonstrate a reasonable relationship between its denial of the Bassos' application [to maintain a well] and the objectives which the denial sought to achieve." *Id.*

68. *See, e.g.*, Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 182 (Fla. 4th Dist. Ct. App. 1975) (upholding the restriction on the use of alcoholic beverages noting widespread use of such restrictions in governmental and private sectors).

69. *Basso*, 393 So. 2d at 639; *see also Cavouti*, 605 So. 2d at 985.

70. *See Basso*, 393 So. 2d at 639; *Cavouti*, 605 So. 2d at 985.

71. Answer Brief of Appellee at 26, *Latera* (No. 93-2952).

restrictions placed by the associations in their recorded declarations of covenants, conditions, and restrictions will not be invalidated unless they are "clearly ambiguous,"[72] applied arbitrarily, or violative of public policy or a fundamental constitutional right.[73]

Category two restrictions, those imposed by the association board, must be "reasonably related to the promotion of the health, happiness and peace of mind of all the unit owners" in order to be valid and enforceable.[74] Therefore, unlike declaration restrictions which may still be valid even if they seem somewhat unreasonable, unreasonable restrictions imposed by an association board will not be enforced by courts.[75]

V. REASONABLENESS OF THE ISLE'S RESTRICTION PROHIBITING SATELLITE DISHES

A. *The Lateras' Arguments*

Florida courts have never ruled that a homeowner's association restriction absolutely prohibiting satellite dishes was unreasonably or arbitrarily applied. Nevertheless, the Lateras asserted that the absolute restriction against satellite dishes was arbitrary and unreasonable as applied to their property.[76] Their argument is based on the fact that the satellite was not visible to other residents and the Isle was attempting to enforce the restriction without considering its underlying purpose or the interests of the parties.[77] Therefore, the Lateras argued that the Isle's attempt to enforce the satellite restriction was "unconscionable" as an "absolute rule."[78]

The purpose of the Isle's restriction against satellites is to "maintain 'property value by insuring aesthetics.'"[79] The Lateras' satellite dish complied with this purpose, as the Lateras made all feasible steps to insure that the satellite dish was "unobtrusive and harmonious with community

72. *Harrington*, 467 So. 2d at 381.

73. *Basso*, 393 So. 2d at 640; *Cavouti*, 605 So. 2d at 985.

74. *Cavouti*, 605 So. 2d at 985 (citing *Basso*, 393 So. 2d at 640). See also *Norman*, 309 So. 2d at 182, for the proposition that "the test is reasonableness. If a rule is reasonable the association can adopt it; if not, it cannot." The court further stated that what is considered unreasonable will depend on the facts and circumstances of each particular case. *Id.*

75. *See Basso*, 393 So. 2d at 640.

76. Appellants' Initial Brief at 20, *Latera* (No. 93-2952).

77. *Id.*

78. *Id.*

79. *Id.* at 21.

aesthetics."[80] The Lateras satellite dish in no way conflicted with community aesthetics within the Isle at Mission Bay since it could not even be seen. Furthermore, the Lateras' satellite was disguised as patio furniture and was secluded within eight-foot hedges and a fence.[81] The Isle, however, did not take this into account, nor did it evaluate whether the Lateras' alleged violation of the restrictive covenant contravened the purpose for imposing the restriction in the first place. Likewise, the Isle did not take into account the equities or hardships of the parties. Therefore, the Lateras maintained that the Isle's attempted enforcement of the restrictive covenant was unreasonable and arbitrary.[82] As support for this argument, the Lateras relied on the case of *Kies v. Hollub*[83] for the proposition that "covenants . . . restraining the free use of real property . . . are not favored in the law and will not be honored by the courts unless the restraint is within reasonable bounds."[84] If an otherwise valid restrictive covenant is being exercised in an unreasonable or arbitrary manner, it is unenforceable.[85] Similarly, the Lateras maintained that even if the Isle's restriction against satellites may otherwise be valid, it should not have been enforced in their case because it was exercised in an unreasonable and arbitrary manner.[86]

The Lateras also cited an analogous California case, *Portola Hills Community Ass'n v. James*,[87] where the court held that a private restriction prohibiting a homeowner from installing a satellite dish was unreasonable.[88] The court refused to enforce the restrictive covenant that completely banned satellite dishes within the community association[89] because it was not visible to other association residents or to the public.[90] The court balanced the intent of the homeowner's association as a whole against the

80. *Id.*
81. Appellants' Reply Brief at 15, *Latera* (No. 93-2952).
82. Appellants' Initial Brief at 21, *Latera* (No. 93-2952).
83. 450 So. 2d 251, 255 (Fla. 3d Dist. Ct. App. 1984).
84. *Id.* (citing Soranaka v. Cook, 343 So. 2d 51, 52 (Fla. 2d Dist. Ct. App. 1977)).
85. Appellants' Initial Brief at 21-22, *Latera* (No. 93-2952).
86. *Id.* at 22.
87. 5 Cal. Rptr. 2d at 583.
88. Appelants' Initial Brief at 23, *Latera* (No. 93-2952).
89. The covenant reads: "'13. Satellite Dish: Absolutely no satellite dish of any nature will be acceptable on the exterior of the units or lots anywhere within the Association. Cable television has been provided for this purpose.'" *James*, 5 Cal. Rptr. 2d at 581 (emphasis omitted).
90. The ten-foot satellite dish was hidden in the back of the homeowner's two-story house, and surrounded by a high slope in the back, six-foot fences, and substantial shrubbery. *Id.* at 582 n.2.

homeowner[91] and concluded it was not reasonable to put an outright ban on satellite dishes.[92] Additionally, the court made reference to a federal government policy to "foster the use of satellite dishes."[93] The court based its decision on the fact that prohibiting a satellite that can not be seen does not promote "any legitimate goal of the association."[94] The *Latera* court could have justifiably relied on this same reasoning to preclude enforcement of the Isle's restriction against satellite dishes.

The Lateras also relied on *Voight v. Harbour Heights Improvement Ass'n*,[95] which involved covenants reserving the right of the association to approve or disapprove proposed construction plans for lots within the community.[96] The *Voight* court concluded that the association's veto power could not be exercised unreasonably or arbitrarily.[97] The final argument asserted by the Lateras was that equity may refuse to enforce restrictions where there has been a change in circumstances which renders enforcement unreasonable.[98] Accordingly, the Lateras asserted that circumstances have changed regarding satellite dishes in that their size, appearance, and ability to be disguised have been altered substantially since the Isle's documents were drafted.[99] The Lateras further argued that "[s]ince dishes merely collect signals and do not omit any interference, as an antenna might do, such wholesale restriction, in light of the continuing progress in technology is archaic and renders strict enforcement unreasonable."[100]

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91. The homeowner installed the satellite dish after seeking approval from the Architectural Control Committee, which was denied. *Id.* at 582.

92. *Id.* The court noted that restrictions regulating satellites for aesthetic reasons would be appropriate. *Id.* at 583.

93. *James*, 5 Cal. Rptr. 2d at 582 n.2.

94. *Id.* at 583.

95. 218 So. 2d at 805. The court stated:

> covenants restraining the free use of real property, although not favored, will nevertheless be enforced where the intention of the parties is clear and the restrictions and limitations are confined to a lawful purpose and within reasonable bounds, but such covenants are strictly construed in favor of the free and unrestricted use of real property.

Id.

96. Appellants' Reply Brief at 14, *Latera* (No. 93-2952).

97. *Voight*, 218 So. 2d at 805.

98. Appellants' Initial Brief at 24, *Latera* (No. 93-2952) (citing Edgewater Beach Hotel Corp. v. Bishop, 163 So. 214 (Fla. 1935)).

99. *Id.*

100. *Id.* at 24-25 (citing Noble v. Kisker, 183 So. 836 (Fla. 1938)).

B. *The Isle's Arguments*

In arguing that the satellite restriction is enforceable, the Isle first asserted that property owners' interests "must yield . . . where ownership is in common or cooperation with others,"[101] and that courts regard restrictions within recorded declarations to be "of paramount importance in defining the rights and obligations of unit owners."[102] The Isle relied on *White Egret Condominium, Inc. v. Franklin*,[103] a case wherein the Supreme Court of Florida acknowledged the necessity of reasonable use restrictions within a condominium association.[104] The Isle also emphasized the strong presumption of validity courts give to restrictions recorded in association declarations.[105] Covenants recorded in association declarations are strongly presumed valid mainly because other homeowners justifiably rely on these restrictions.[106] Presumably, a homeowner knows of these restrictions before purchasing property within the association and can decide at that time whether they want to be subject to them.[107] Thus, the proper time to object to a restriction is before making the decision to buy within a community, rather than after.[108]

The Association maintained that other homeowners in the association chose "to live in a community that would not be cluttered by unsightly or aesthetical displeasing 'outdoor television antenna systems . . . .'"[109]

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101. Answer Brief of Appellee at 24, *Latera* (No. 93-2952) (citing *Breitenbach*, 251 So. 2d at 685).

102. *Id.* (citing Pepe v. Whispering Sands Condominium Ass'n, 351 So. 2d 755, 757-58 (Fla. 2d Dist. Ct. App. 1977)). The court in *Pepe* stated:

> A declaration . . . is more than a mere contract spelling out mutual rights and obligations of the parties thereto—it assumes some of the attributes of a covenant running with the land, circumscribing the extent and limits of the enjoyment and use of real property. Stated otherwise, it spells out the true extent of the purchased, and thus granted, use interest therein. Absent consent, or an amendment of the declaration . . . as may be provided for in such declaration, . . . this enjoyment and use cannot be impaired or diminished.

Pepe, 351 So. 2d at 757-58.

103. 379 So. 2d 346 (Fla. 1979).

104. The court held that "a condominium restriction or limitation does not inherently violate a fundamental right and may be enforced if it serves a legitimate purpose and is reasonably applied." *Id.* at 350.

105. Answer Brief of Appellee at 25-26, *Latera* (No. 93-2952).

106. *Id.* at 26.

107. *Id.*

108. *Id.*

109. *Id.* at 29. The Isle also claimed the homeowners should be protected from hazards that could occur should "'outdoor television antenna systems or facilities' break loose in a

Consistent with the principle that the interests of the homeowner's association in the aesthetics of its community outweighed the interests of the individual property owners,[110] the Association relied on *Woodbridge Homeowners Ass'n, Inc. v. Desmond.*[111] In *Woodbridge*, the court stated that a satellite dish disguised as patio furniture was still a satellite dish and thus subject to the association's declaration that prohibited satellite dishes.[112]

Finally, the Isle maintained that if it allowed the Lateras to maintain their satellite dish in violation of the restrictions, then the Isle could not enforce this restriction against other homeowners under the "doctrine of 'selective enforcement.'"[113] Accordingly, the Isle argued the result would be the association "mushroom[ing]" into "a 'satellite dish' farm," which would not be fair to the other homeowners who purchased their homes relying upon the Isle's declarations.[114] Overall, the Isle's position con-

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storm or hurricane." Answer Brief of Appellee at 29, *Latera* (No. 93-2952). In defense of this argument, the Lateras emphasized that their satellite dish was securely embedded in concrete and survived Hurricane Andrew without proving to be dangerous. Appellants' Reply Brief at 15, *Latera*, (No. 93-2952).

110. Answer Brief of Appellee at 28, *Latera* (No. 93-2952).

111. Appellants' Initial Brief at 22 (citing *Woodbridge Homeowners Ass'n*, No. 91-CV-0415 (Oh. Clearmont County Ct. C.P. 1991)).

112. Answer Brief of Appellee at 27-28, *Latera* (No. 93-2952). The *Woodbridge* court held that:

> To say that the satellite dish does not violate the Declaration just because it looks like a piece of patio furniture would be, in affect [sic] rewriting the restrictions on behalf of the Homeowners Association. If the Homeowners Association wanted to exclude well disguised satellite dishes from the operation of the restrictive covenants, it could have done so . . . This court, however, does not have the authority to provide exceptions to the restrictive covenants.

Id. at 28. In defense to the Isle's argument that a disguised satellite is still a satellite and thus subject to the restriction prohibiting satellites, the Lateras argued the issue is not whether a satellite ceased to be a satellite dish when it is disguised. Appellants' Initial Brief at 22-23, *Latera* (No. 93-2952). Rather, the Lateras asserted that the issue concerned the purpose for enacting and enforcing the restriction: "to preserve and protect property value by controlling ascetics." *Id.* Since the satellite was disguised as patio furniture, this purpose was met without the need to enforce the restrictive covenant. *See id.* at 23.

113. Answer Brief of Appellee at 30, *Latera* (No. 93-2952) (citing Fifty-Six Sixty Collins Ave. Condominium, Inc. v. Dawson, 354 So. 2d 432 (Fla. 3d Dist. Ct. App. 1978)).

114. *Id.* The Isle claimed the Lateras had two alternatives if they wanted to have a satellite dish: move to a community which permits satellite dishes, or obtain support of enough Isle homeowners to seek an amendment to the declaration addressing the permissibility of satellite dishes. *Id.* at 30-31.

cerned serving the interests of the homeowners who purchased homes in the Isle in reliance on the declaration restrictions.[115]

VI. CONSTITUTIONALITY OF THE ISLE'S RESTRICTION PROHIBITING SATELLITE DISHES

A. *Fundamental Right*

The Lateras' local cable company only carries a limited number of satellite services.[116] Without access to a satellite dish, the Lateras will not be able to receive the unique programming available only through satellite reception.[117] The Lateras have a First Amendment right to free access to information.[118] Therefore, by denying the Lateras the opportunity to receive unique satellite programs, the Isle abridged the Lateras' First Amendment rights.

The Due Process Clause of the Fourteenth Amendment protects First Amendment freedoms of press and speech from being abridged by state action.[119] The Supreme Court of California in *Weaver v. Jordan*,[120] stated that the First Amendment right of freedom of speech and press includes the right to receive information.[121] In *Weaver*, the Supreme Court of California concluded that the "Free Television Act," which banned subscription television when homeviewers were charged, violated the constitutional guarantees of free speech and press.[122] The court emphasized that "the rights of free speech and press are worthless without an effective means of expression," and that the First Amendment protects "amusement and entertainment as well as the exposition of ideas."[123] Most importantly, the *Weaver* court recognized that "[t]he right of freedom

115. *Id.* at 30.

116. Residents of the Isle at Mission Bay have access to cable television through West Boca Cablevision. The cable system, however, does not offer programs available on satellite, including "C-Span II (complete coverage of U.S. Senate proceedings and public affairs programming not duplicated on C-Span I), SCOLA (international programming from foreign television broadcasters) and NASA Select (complete coverage of all NASA launch and space flight activities)." Brief of Amicus Curiae at 9 n.21, *Latera* (No. 93-2952).

117. *Id.*

118. *See* U.S. CONST. amend. I.

119. *See id.* amend. XIV. *See also* Albright v. Oliver, 114 S. Ct. 807, 812 (1994); Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

120. 411 P.2d 289 (Cal.), *cert. denied*, 385 U.S. 844 (1966).

121. *Id.* at 294.

122. *Id.* at 299.

123. *Id.* at 294; *see also* Brief of Amicus Curiae at 11, *Latera*, (No. 93-2952).

of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] the right to read . . . ."[124]

Subsequently in *Red Lion Broadcasting Co. v. F.C.C.*,[125] the Supreme Court of the United States stated "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . ."[126] There are also many other Supreme Court cases recognizing or confirming the importance of the basic First Amendment right to receive information.[127] Likewise, federal courts in Florida have recognized that the First Amendment encompasses the right to receive information.[128] However, in *Decker v. City of Plantation*,[129] the court noted that the "First Amendment right to receive information via a satellite dish is a relative right which may be outweighed by important governmental interests, such as the protection of community aesthetics."[130]

Additionally, in *Abbott v. City of Cape Canaveral*,[131] the United States District Court for the Middle District of Florida expressed the view that *Red Lion* did not guarantee a person the right to receive access to the maximum amount of satellite programming available.[132] Abbott claimed that a local Cape Canaveral ordinance regulating placement of satellite dishes violated his First Amendment rights since the placement of his satellite affected the amount of satellite programming he could receive.[133]

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124. *Weaver*, 411 P.2d at 294 (emphasis omitted) (quoting *Griswold*, 381 U.S. at 482).

125. 395 U.S. 367 (1969).

126. *Id.* at 390.

127. *See* Brief of Amicus Curiae at 12, *Latera* (No. 93-2952). The following Supreme Court cases were cited in the brief: Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (invalidating ordinance governing zoning restrictions on live entertainment); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978); *Red Lion Broadcasting Co.*, 395 U.S. at 367 (challenging constitutional basis of the FCC Fairness doctrine); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (stating "the Constitution protects the right to receive information and ideas"); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (stating "the right of freedom of speech and press . . . necessarily protects the right to receive it").

128. *See* Abbott v. City of Cape Canaveral, 840 F. Supp. 880, 886 (M.D. Fla.) (stating the "First Amendment may protect the right to receive suitable access to television broadcasts"), *aff'd*, 41 F.3d 669 (11th Cir. 1994); Decker v. City of Plantation, 706 F. Supp. 851, 854 (S.D. Fla. 1989).

129. 706 F. Supp. at 854.

130. *Id.*

131. 840 F. Supp. at 880.

132. *Id.* at 886. The court reasoned that "[b]ecause the right to receive satellite television programming of one's choice is not a fundamental right, the proper standard of review is whether the ordinance is reasonably related to a legitimate state interest." *Id.* (citing Johnson v. City of Pleasanton, 982 F.2d 350, 353 (9th Cir. 1992)).

133. *Id.* at 882.

The court concluded that the ordinance was a "content-neutral"[134] ordinance "regulating the time, place, and manner of expression."[135] "Courts will uphold a content-neutral ordinance" against First Amendment claims if it "furthers a substantial governmental interest and does not unreasonably limit alternative avenues of communication."[136] Accordingly, the court upheld the ordinance because it served a substantial government interest by protecting the health, safety, and aesthetic values of the community.[137] Furthermore, Abbott failed to show a limitation on his alternative avenues of communication.[138]

Abbott is distinguishable from *Latera* because *Abbott* involved a city ordinance regulating the placement of a satellite dish in Abbott's yard.[139] Placement of a satellite dish can hinder the number of satellite signals that can be received.[140] However, in *Latera,* the homeowner's association completely banned the placement of satellite dishes anywhere on the homeowner's property.[141] Consequently, the Lateras were not confronted with the situation where they missed out on a few satellite programs because an ordinance required their satellite dish to be inconveniently placed.[142] Rather, the homeowner's association restriction prevented the Lateras from receiving access to all satellite programs with the exception of the few services they could obtain through their cable system.[143] Therefore, the homeowner's association's restriction prohibiting satellites unreasonably limited the Lateras' alternative avenues of communication.

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134. *Id.* at 886.

135. *See Johnson*, 982 F.2d at 353.

136. *Abbott*, 840 F. Supp. at 886; *see also Johnson*, 982 F.2d at 353; Brief of Amicus Curiae at 13, *Latera* (No. 93-2952) (emphasis omitted) (noting "a rule or regulation restricting access to protected communication will never be sustained unless the regulation permits a reasonable alternative means of access to the same communication").

137. *Abbott*, 840 F. Supp. at 886.

138. *Id.*; *see also Johnson*, 982 F.2d at 354. The *Johnson* court found that a city ordinance setting height, screening, and setback requirements for satellite-receive-only antennas is a valid time, place, and manner regulation. *Id.* Furthermore, the *Johnson* court found that the city ordinance serves to prevent "installation of satellite antennas that unreasonably interfere with other individuals' enjoyment of their land and which pose issues of public safety." *Id.*

139. *Abbott*, 840 F. Supp. at 881-82.

140. *See* Brief of Amicus Curiae at 10, *Latera* (No. 93-2952).

141. *Latera*, 655 So. 2d at 145.

142. *See Johnson*, 982 F.2d at 352; *Decker*, 706 F. Supp. at 853; Kessler v. Town of Niskayuna, 774 F. Supp. 711, 712 (N.D.N.Y. 1991); *Keever*, 595 So. 2d at 1020; Brophy v. Town of Castine, 534 A.2d 663, 664 (Me. 1987).

143. *Latera*, 655 So. 2d at 145.

Furthermore, the Isle's restriction against satellites may serve to protect the welfare and aesthetic values of the Isle community.[144] But as previously emphasized, the Lateras' satellite dish did not harm community aesthetic values because it was not visible to the public. Therefore, an effective argument could be made that the Isle's restriction is not a reasonable time, place, and manner restriction,[145] and the Isle is not justified in depriving the Lateras of information they have a First Amendment right to receive.

B. *State Action*

There are many cases involving satellite dishes which concern the federal law preemption[146] of local ordinances which regulate satellite size and/or placement.[147] Homeowners have alleged that zoning ordinances

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144. Appellants' Initial Brief at 21, *Latera* (No. 93-2952).

145. A time, place, and manner regulation will not be sustained unless there is reasonable alternative access to the same communication. Brief of Amicus Curiae at 13, *Latera* (No. 93-2952) (citing Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (stating "a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate")). *See also* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 518 n.24 (1981); Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 535 (1980); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 97-98 (1977) (striking ordinance prohibiting "for sale" signs as alternative communication channels to list residence were likely to be more expensive and less effective); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (invalidating statute prohibiting the advertisement of prices for prescription drugs and rejecting in the process an argument that consumers could acquire the same information by simply making inquiries to pharmacists); *Martin*, 319 U.S. at 146 (invalidating regulations prohibiting door to door distribution of circulars and handbills and rejecting arguments that communication is still possible); Schneider v. State, 308 U.S. 147 (1939).

146. According to the F.C.C. regulation:

> State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:
>
> (a) Have a reasonable and clearly defined health, safety or aesthetic objective; and
>
> (b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.

47 C.F.R. § 25.104 (1994).

147. *See* Loschiavo v. City of Dearborn, 33 F.3d 548, 553 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1099 (1995); *Johnson*, 982 F.2d at 350; *Abbott*, 840 F. Supp. at 880; *Decker*, 706 F. Supp at 851. The *Loschiavo* court concluded that homeowners "are entitled to bring a section 1983 action against the City of Dearborn to enforce their right to install a receive-

violate their First Amendment right to receive information, since the placement of a satellite can impact the amount of satellite signals that can be received.[148] The state action issue does not arise in these cases, however, since the zoning ordinances in question constitute the requisite state action needed to assert a constitutional violation.[149]

The state action issue does, however, arise in cases where private individuals assert that a homeowner's association has violated their constitutional rights. For example, in *Ross v. Hatfield*,[150] the court found a lack of state action where a covenant banning television antennas outside residences had not been judicially enforced, and no suit had ever been initiated to enforce the covenant.[151] The *Ross* court acknowledged the uncertainty regarding the applicability of *Shelley v. Kraemer*[152] to non-racial discriminatory covenants, but stated that *Shelley* required "actual judicial enforcement of the covenant before state action may be found."[153]

In Florida, the supreme court in *Harris v. Sunset Islands Property Owners, Inc.*,[154] opined that:

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only satellite antenna for private viewing of satellite programming." *Loschiavo*, 33 F.3d at 553. See also *Kessler*, 774 F. Supp. at 718, which granted plaintiff's summary judgment motion because the Town of Niskayuna ordinance "operates to differentiate between TVROs [satellite television receive-only dish antennas] and other antenna facilities yet fails to state a legitimate objective for the distinction." Therefore, the court found the ordinance was preempted by federal legislation. *Id.*; *see, e.g.*, Carino v. Town of Deerfield, 750 F. Supp. 1156, 1164 (N.D.N.Y. 1990) (dismissing complaint because the state supreme court expressly considered and rejected the preemption argument), *aff'd*, 940 F.2d 649 (2d Cir. 1991); Alsar Tech. v. Zoning Board of Adjustment, 563 A.2d 83, 84 (N.J. Super. Ct. Law Div. 1989) (holding the Nutley ordinance is discriminatory and preempted by F.C.C. regulation due to unreasonable burden on satellite reception).

148. *See Loschiavo*, 33 F.3d at 550; *Johnson*, 982 F.2d at 350; *Abbott*, 840 F. Supp. at 881; *Kessler*, 774 F. Supp. at 713; *Carino*, 750 F. Supp. at 1160; *Decker*, 706 F. Supp. at 852; *Brophy*, 534 A.2d at 664 (recognizing "that the right to receive information is a component of the concept of free speech"); L.I.M.A. Partners v. Borough of Northvale, 530 A.2d 839 (N.J. Super. Ct. App. Div. 1987) (discussing validity of Northvale's zoning ordinance).

149. *See Ross*, 640 F. Supp. at 712.

150. *Id.* at 708.

151. *Id.* at 710.

152. 334 U.S. 1, 20 (1948) (holding that judicial enforcement of restrictive covenants discriminating against persons of different race from ownership of property denied petitioners equal protection).

153. *Ross*, 604 F. Supp. at 710.

154. 116 So. 2d 622 (1959) (involving covenants restricting sale and occupancy of land).

> [t]he rule of *Shelley v. Kraemer* . . . has become so thoroughly grounded in the decisions of the state courts around the country as well as in the courts of the federal system that only a total blindness to the compelling and controlling aspects of the decision would enable us to avoid it.[155]

Accordingly, the Supreme Court of Florida acknowledged that judicial enforcement of a covenant in violation of the rights of property owners constitutes the requisite state action necessary for the property owner to assert a constitutional violation.[156]

Finally, in *Brock v. Watergate Mobile Home Park Ass'n*,[157] the Fourth District Court of Appeal discussed two tests used to determine whether conduct of private persons or groups constitutes state action subjecting them to constitutional limitations: the "public function test," and the "state involvement test."[158] The court stated that "[u]nder the public function test, state action will be found where the functions of a private individual or group are so impregnated with a governmental character as to appear municipal in nature."[159] Additionally, the court stated that "[u]nder the state involvement test, there must be a sufficiently close nexus between the State and the challenged activity such that the activity may be fairly treated as that of the State itself."[160] Applying these tests, the court concluded that the homeowner's association did not act in such a public manner that its actions could be considered state action.[161]

In the instant case, the Lateras claimed that the Isle at Mission Bay Homeowner's Association deprived them of their constitutional right to receive information.[162] Since the Isle is not a governmental entity and is not acting on behalf of the government, there was an issue as to whether there was state action.[163] Because the Constitution limits state action that abridges First Amendment rights through incorporation of the Fourteenth

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155. *Id.* at 625.

156. *See id.* at 624 (recognizing that a state can only act through its executive, legislative, or judicial branches as expressed in *Shelley*).

157. 502 So. 2d 1380 (Fla. 4th Dist. Ct. App. 1987).

158. *Id.* at 1381.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Latera*, 655 So. 2d at 146.

163. *See* Appellants' Initial Brief at 25, *Latera* (No. 93-2952); Answer Brief of Appellee at 31-35, *Latera* (No. 93-2952); Appellants' Reply Brief at 17, *Latera* (No. 93-2952).

Amendment, a court cannot exercise jurisdiction over a claim alleging First Amendment infringement, unless it finds sufficient state action.[164]

1. The Lateras' Arguments

The Lateras maintained that judicial enforcement of the Isle's private restrictive covenant constituted state action and therefore, they were deprived of their constitutionally protected right to receive information.[165] They relied on the well known principle established in *Shelley* that "acts of a state court enforcement of a private restrictive covenant constituted 'state action.'"[166] The Lateras noted that the *Shelley* opinion did not limit its findings to private restrictive covenants that are discriminatory in nature.[167] Accordingly, the Lateras cited cases where courts applied the principle established in *Shelley* to other constitutionally protected activities,[168] including the First Amendment right to free speech,[169] and the First Amendment right to display an American flag.[170]

In *Gerber v. Longboat Harbour North Condominium*, the court found that a condo regulation prohibiting display of the American flag except on designated national holidays infringed upon the unit owner's First Amendment rights.[171] The court refused to enforce the covenant, reasoning that judicial enforcement would constitute sufficient state action depriving the owner of his constitutional rights within the meaning of the Civil Rights Act.[172] The Isle sought judicial enforcement of a private restrictive covenant prohibiting satellite dishes.[173] Therefore, according to the reasoning in *Gerber*, and consistent with *Shelley*, there was sufficient state

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164. *See Ross*, 640 F. Supp. at 710.
165. Appellants' Initial Brief at 25, *Latera* (No. 93-2952).
166. *Id.* (citing *Shelley*, 334 U.S. at 20).
167. *Id.*
168. Appellants' Initial Brief at 25, *Latera* (No. 93-2952).
169. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
170. Gerber v. Longboat Harbour North Condominium, 724 F. Supp. 884 (M.D. Fla. 1989), *order vacated in part*, 757 F. Supp. 1339 (M.D. Fla. 1991).
171. *Id.* at 887.
172. *Id.* Section 1983 of the Civil Rights Act provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C. § 1983 (1988).
173. Answer Brief of Appellee at 7, *Latera* (No. 93-2952).

action in *Latera* for the homeowner to successfully allege a constitutional claim.

2. The Isle's Arguments

In defense to the Lateras' claim of a constitutional violation, the Isle maintained that there could be no violation of the Lateras' constitutional rights without state action.[174] The Isle argued there was no state action, stating that "[i]t is now generally accepted that neither the recording of a non-discriminatory restrictive covenant in the Public Records nor its enforcement through the courts of this state constitutes sufficient 'state action' to render parties purely private contracts relating to the ownership of real property unconstitutional."[175] The Isle also reasoned that courts should enforce the private non-discriminatory covenants because the Lateras could have chosen not to purchase property within the association if they did not approve of the restriction against satellites.[176] The Isle further asserted that the availability of a forum to resolve private conflicts does not constitute state action.[177] Accordingly, the Isle maintained that in order to constitute state action, the court must use its power to "compel or legitimize" private actions, which is the equivalent of state encouragement.[178]

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174. *Id.* at 34.

175. Answer Brief of Appellee at 31, *Latera* (No. 93-2952) (citation omitted); *see also*, Quail Creek Property Owners Ass'n v. Hunter, 538 So. 2d 1288, 1289 (Fla. 2d Dist. Ct. App. 1989); Rocek v. Markowitz, 492 So. 2d 460 (Fla. 5th Dist. Ct. App. 1986); Schreiner v. McKenzie Tank Lines, 408 So. 2d 711 (Fla. 1st Dist. Ct. App. 1982), *decision approved*, 432 So. 2d 567 (Fla. 1983). *Contra* Appellants' Reply Brief at 17, *Latera*, (No. 93-2952) (citing *Quail Creek*, 538 So. 2d at 1289). In *Quail Creek* the homeowners sought injunctive and declatory relief from enforcement of a covenant prohibiting display of a "for sale" sign. *Quail Creek*, 538 So. 2d at 1289. The homeowners never established that they attempted to display the sign, or that they were prevented from doing so by the association. *Id.* The court held that "neither the recording of the protective covenant in the public records, nor the possible enforcement of the covenant in the courts of the state, constitutes sufficient 'state action' to render the parties' purely private contracts relating to the ownership of real property unconstitutional." *Id.* The Appellants' Reply Brief quoted the above passage, placing emphasis on the word "possible." Appellants' Reply Brief at 17, *Latera* (No. 93-2952).

176. Answer Brief of Appellee at 32, *Latera* (No. 93-2952) (citing *Rocek*, 492 So. 2d at 461; *Franklin*, 379 So. 2d at 346).

177. *Id.* (citing *Schreiner*, 408 So. 2d at 718; Girard v. 94th Street & 5th Ave. Corp., 396 F. Supp. 450 (S.D.N.Y. 1975), *order aff'd*, 530 F.2d 66 (2d Cir.), *and cert. denied*, 425 U.S. 974 (1976)).

178. *Id.* at 33 (citing *Schreiner*, 408 So. 2d at 720).

Additionally, the Isle argued that under *Shelley* judicial enforcement of private covenants may involve state action in some instances, but the applicability of *Shelley* remains undeveloped.[179] According to the Isle, the court in *Schreiner v. McKenzie Tank Lines*[180] rejected the proposition in *Shelley* which mandated that there was state action whenever a state court becomes involved or refuses to get involved in a private matter.[181] Finally, the Isle argued that to recognize *Shelley* as creating state action whenever there is judicial involvement in a private matter would "obliterate the line between private and state actions."[182] The Isle further contended that because its recorded declaration prohibiting satellites was not discriminatory, there was no state action even if judicially enforced.[183] Consequently, the Isle maintained that there can be no constitutional violation of the Lateras' rights.[184]

VII. CONCLUSION

The Fourth District Court of Appeal failed to recognize that the right to receive information via a satellite dish is a constitutionally protected right.[185] Further, the court failed to recognize that a restriction, premised on aesthetic reasons, prohibiting a satellite dish which is not visible is unreasonable and arbitrary.[186] Because the court failed to make these findings, its decision was incorrect.

The Supreme Court of the United States has acknowledged that the right to receive information, including amusement and entertainment, is guaranteed by the First Amendment.[187] The Supreme Court of the United States has also acknowledged that state action exists when courts enforce private covenants.[188] Further, it is federal government policy to promote

179. *Id.* at 32 (citing *Schreiner*, 408 So. 2d at 719; Edwards v. Habib, 397 F. 2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969)).

180. 408 So. 2d at 711.

181. Answer Brief of Appellee at 33, *Latera* (No. 93-2952). In *Schreiner*, the court found there was no state action where an employee sought state court resolution of a private conflict involving constitutional violations against his employer. *Schreiner*, 408 So. 2d at 720.

182. Answer Brief of Appellee at 33, *Latera* (No. 93-2952).

183. *Id.* at 34.

184. *Id.*

185. *Latera*, 655 So. 2d at 146.

186. *Id.*

187. *See Weaver*, 411 P.2d at 294.

188. *Shelley*, 334 U.S. at 20.

new technology, including the use of satellite dishes.[189] The satellite industry is a rapidly expanding industry which offers unique programming services that exceed the capabilities of ordinary cable systems.[190] Therefore, satellite technology should not be hindered by the restrictions of homeowner's associations prohibiting the erection and maintenance of satellite dishes. Accordingly, it was error for the *Latera* court to enforce the Isle's private restrictive covenant, which is in violation of the Lateras' First Amendment rights.

The interests of homeowner's associations in community aesthetics may sometimes justifiably outweigh the interests of individual property owners. But, notwithstanding the promotion of the homeowner's associations' goals, restrictive covenants should not infringe upon rights guaranteed by the United States Constitution. Homeowners should not have to give up every one of their freedoms simply by their decision to reside in a community regulated by a homeowner's association. The aesthetics of the community can still be preserved, despite the installation of a satellite dish, because of the new technology rendering satellites smaller and capable of being disguised and sometimes even totally concealed.

Florida courts have consistently held that a private restrictive covenant will not be enforced if an association applies it unreasonably or arbitrarily.[191] Since satellite dishes have developed into more aesthetically acceptable structures, these new satellite features should be considered in determining the reasonableness of an association's restriction prohibiting them. The *Latera* court could have justifiably relied on the reasoning that the prohibition of a satellite dish which cannot be seen does not promote any goal of the association. Accordingly, the *Latera* court should have evaluated whether prohibiting a disguised satellite dish was unreasonable or arbitrary. The court was in error to find that such an argument was without merit.

The holding in the *Latera* case is likely to have an adverse impact on future cases involving restrictive covenants imposed by homeowner's associations, at least from the standpoint of a homeowner within a community association. The tests used by Florida courts in the past to determine the validity of these restrictions were formulated for a purpose: to limit the unreasonable exercise of power by associations.[192] Unfortunately, the holding in *Latera* does not coincide with this purpose. Rather,

189. 47 U.S.C. § 157(a) (1988). *See supra* note 8 and accompanying text.
190. *See supra* notes 6-7 and accompanying text.
191. *See Basso*, 393 So.2d at 640; *Cavouti*, 605 So. 2d at 985.
192. *See Basso*, 393 So. 2d at 639.

the *Latera* decision can be used in subsequent cases by homeowner's associations as authority in support of the position that First Amendment rights of homeowners are not violated if the association precludes them from receiving information via a satellite dish. Further, according to *Latera*, courts will be justified in enforcing restrictive covenants without first evaluating the equities and hardships of the individual homeowner against the interests of the homeowner's association, to determine whether a restrictive covenant was arbitrarily applied or is so unreasonable as to render it invalid. As a result, homeowners who choose to live within the confines of a community association which prohibits satellite dishes will have to sacrifice their First Amendment right to receive information, regardless of whether the restriction actually preserves the aesthetics of the community.

Zelica Marie Grieve

Compensation for Commercial Fishermen in the Wake of the 1994 Florida Constitutional Amendment Limiting Marine Net Fishing

TABLE OF CONTENTS

I. OVERVIEW

This note discusses the Florida constitutional amendment which banned the use of gill nets and other entangling nets in Florida waters and the "Net Ban Assistance Plan" that was enacted by the Florida Legislature to compensate commercial fishermen who have lost their jobs as a result of this amendment. Part II discusses the evolution of the net ban. Part III focuses on two programs that were passed by the legislature to compensate commercial net fishermen for their losses related to the net ban, the economic assistance for loss of income program, and the net buy-back program. Part IV explains where eligible fishermen can go for compensation and the procedures for obtaining compensation. Part V ends with a summary of what the compensation programs mean to commercial fishermen.

II. INTRODUCTION

The commercial and recreational fishing industries became sharply divided in 1994 during the fight to ban commercial fish-netting off the Florida coast. The hot issue was a proposed amendment to the *Florida Constitution* which would limit the use of fishing nets in Florida coastal waters. A petition drive, which was initiated by Karl Wickstrom, publisher of *Florida Sportsman* magazine, resulted in Amendment Three (as it was

known on the ballot) being placed on the ballot.[1] Wickstrom and other sport fishermen had unsuccessfully lobbied the Florida Legislature to obtain a ban on gill netting, and began the petition drive in 1992.[2] In the months leading up to the November 8, 1994 state election, the two sides took cheap shots at one another, each arguing that the other side's platform could not be substantiated.[3] In the end the more powerful sportfishing lobby won. Article X, section 16 of the *Florida Constitution* became a reality.[4]

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1. *See* Karl Wickstrom, *Constitution Here We Come,* FLA. SPORTSMAN, Nov. 1992, at 18.

2. Russ Fee, *Florida Net Ban Dies*, NAT'L FISHERMAN, May 1992, at 8.

3. *See* Phillip Longman, *Fish Fight: Pay Up or Cut Bait*, FLA. TREND, Jan. 1992, at 32; Don Wilson, *Ban on Nets Needed to Protect Resources*, ORLANDO SENTINEL, May 15, 1994, at C16.

4. FLA. CONST. art. X, § 16. The text of the amendment reads as follows:

§ 16. Limiting marine net fishing

(a) The marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations. To this end the people hereby enact limitations on marine net fishing in Florida waters to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing, and waste.

(b) For purposes of catching or taking any saltwater finfish, shellfish or other marine animals in Florida waters:

(1) No gill nets or other entangling nets shall be used in Florida waters; and

(2) In addition to the prohibition set forth in (1), no other type of net containing more than 500 square feet of mesh area shall be used in nearshore and inshore Florida waters. Additionally, no more than two such nets, which shall not be connected, shall be used from any vessel, and no person not on a vessel shall use more than one such net in nearshore and inshore Florida waters.

(c) For purposes of this section:

(1) "gill net" means one or more walls of netting which captures saltwater finfish by ensnaring or entangling them in the meshes of the net by the gills, and "entangling net" means a drift net, trammel net, stab net, or any other net which captures saltwater finfish, shellfish, or other marine animals by causing all or part of heads, fins, legs, or other body parts to become entangled or ensnared in the meshes of the net, but a hand thrown cast net is not a gill or an entangling net;

(2) "mesh area" of a net means the total area of netting with the meshes open to comprise the maximum square footage. The square footage shall be calculated using standard mathematical formulas for geometric shapes. Seines and other rectangular nets shall be calculated using the maximum length and maximum width of netting. Trawls and other bag type nets shall be calculated as a cone using the maximum circumference of the net mouth to derive the radius, and the maximum length from the net mouth to the tail end of the net

Florida voters voted by an overwhelming 71.7% margin to ban all gill nets and other entangling nets from use in Florida waters.[5] Florida waters extend three miles out from the Atlantic coast and nine miles into the Gulf of Mexico.[6] The ban prohibits the use of other nets containing more than 500 square feet of mesh area in nearshore and inshore Florida waters.[7] Nearshore and inshore Florida waters extend one mile out from the Atlantic coast and three miles out into the Gulf of Mexico.[8] Gill nets are walls of netting which capture saltwater finfish by ensnaring or entangling them in

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to derive the slant height. Calculations for any other nets of combination type nets shall be based on the shape of the individual components;

(3) "coastline" means the territorial sea base line for the State of Florida established pursuant to the laws of the United States of America;

(4) "Florida waters" means the waters of the Atlantic Ocean, the Gulf of Mexico, the Straits of Florida, and any other bodies of water under the jurisdiction of the State of Florida, whether coastal, intracoastal or inland, and any part thereof; and

(5) "nearshore and inshore Florida waters" means all Florida waters inside a line three miles seaward of the coastline along the Gulf of Mexico and inside a line one mile seaward of the coastline along the Atlantic Ocean.

(d) This section shall not apply to the use of nets for scientific research or governmental purposes.

(e) Persons violating this section shall be prosecuted and punished pursuant to the penalties in s. 370.021(2)(a), (b), (c)6. and 7., and (e), Florida Statutes (1991), unless and until the legislature enacts more stringent penalties for violation thereof. On and after the effective date of this section, law enforcement officers in the state are authorized to enforce the provisions of this section in the same manner and authority as if a violation of this section constituted a violation of Chapter 370, Florida Statutes (1991).

(f) It is the intent of this section that implementing legislation is not required for enforcing any violations hereof, but nothing in this section prohibits the establishment by law or pursuant to law of more restrictions on the use of nets for the purpose of catching or taking any saltwater finfish, shellfish, or other marine animals.

(g) If any portion of this section is held invalid for any reason, the remaining portion of this section, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application.

(h) This section shall take effect on the July 1 next occurring after approval hereof by vote of the electors.

Id.

5. *Florida Business Network's 1994 General Election Analysis*, FLA. BUS. NETWORK, November 9, 1994, at 17-18.

6. DIVISION OF LAW ENFORCEMENT, FLA. DEP'T OF ENVTL. PROT., NET GUIDELINES (1995) [hereinafter NET GUIDELINES].

7. FLA. CONST. art. X, § 16(b)(2).

8. *Id.* § 16(c)(5); NET GUIDELINES, *supra* note 6.

the meshes of a net by the fish's gills.[9] Entangling nets are described as "a drift net, trammel net, stab net, or any other net which captures saltwater finfish, shellfish, or other marine animals by causing all or part of heads, fins, legs, or other body parts to become entangled or ensnared in the meshes of the net . . . ."[10] A drift net is a form of gill net. It is "a large net that is arranged to drift with the tide or current and that is either buoyed up by floats or attached to a drift boat."[11] A trammel net is "constructed of two or more walls of netting hung from the same cork and lead lines, with one wall having a larger mesh than the other(s), which traps a fish in a pocket of netting when the fish pushes the smaller wall through a mesh in the larger wall."[12] A stab net is "a gill or trammel net, that sinks to the bottom when placed, set, or fished in water deeper than its hanging depth."[13]

Other types of nets which are not specifically referenced in the constitutional amendment, but which are nevertheless illegal as a result of the net ban, are beach, purse, and seine nets, and shrimp trawls.[14] This is because they fall under section 16(b)(2) of the amendment, which prohibits the use of other types of nets containing more than 500 square feet of mesh area in nearshore and inshore waters.[15] In general terms, a seine is a "small-meshed net suspended vertically in the water, with floats along the top margin and weights along the bottom margin, which encloses and concentrates fish, and does not usually entangle them in the meshes."[16] More specifically, a beach or haul seine is a "seine that is hauled or dragged over the bottom into shallow water or onto the beach, either by hand or with power winches."[17] Purse seines are seines that are "pulled into a circle around fish with rings attached to the lower margin below the lead line to allow a purse line to be drawn to close the bottom of the seine."[18] The

9. FLA. CONST. art. X, § 16(c)(1). The *Florida Administrative Code* similarly describes a gill net as "a wall of netting suspended vertically in the water, with floats across the upper margin and weights along the bottom margin which captures fish by entangling them in the meshes, usually by the gills." FLA. ADMIN. CODE ANN. r. 46-4.002(2) (1995).

10. FLA. CONST. art. X, § 16(c)(1).

11. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 690 (1971).

12. FLA. ADMIN. CODE ANN. r. 46-4.002(11) (1995).

13. *Id.* r. 46-4.002(10).

14. *See* ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. 2660, 2663 (West) (to be codified at FLA. STAT. § 370.0805(5)(a)4.-5.).

15. FLA. CONST. art. X, § 16(b)(2).

16. FLA. ADMIN. CODE ANN. r. 46-4.002(8) (1995).

17. *Id.* r. 46-4.002(8)(a).

18. *Id.* r. 46-4.002(8)(b).

effect is that a pouch is created allowing the fish to be pulled out of the water. A trawl is "a large conical net with a device for keeping its mouth open that is dragged along the sea bottom in gathering fish or other marine life."[19]

III. THE NET BAN ASSISTANCE PLAN

Throughout all of the turmoil associated with the constitutional amendment and petition drive, both sides agreed that if the net ban amendment passed, it would be important that the Florida Legislature take steps to provide economic support to the fishermen who would be forced to enter new fields of employment. The "Save Our Sealife" ("SOS") Committee, an organization started by Karl Wickstrom to lobby for the passage of the net ban amendment, suggested that a surcharge be placed on sport fishing licenses as a way to raise money to help those most hurt by the ban.[20] The amendment does not specifically provide for such compensation, but it appears that part of the original plan was to create economic assistance programs for the net fishermen if and when the net ban passed.

The decision to compensate the fishermen who are being affected by this net ban is purely the result of legislative initiative. There is no legal requirement that these fishermen be compensated for the loss of the ability to fish coastal waters. To date, no Florida court has recognized a right to fish in public waters, nor has any court recognized a property right in the fish that swim off the Florida coast.[21] Those arguing to have this constitu-

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19. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2433 (1971).

20. *See* Karl Wickstrom, *Victory for the Sea*, FLA. SPORTSMAN, Dec. 1994, at 10, 11 (recommending a three dollar surcharge on sport and commercial fishing licenses, licensing of shore anglers to raise additional funds, and private sector donations to help "full-time, veteran net-users whose gear is the type eliminated from use in nearshore waters"); *see also* Wickstrom, *supra* note 1, at 19.

A surcharge on fishing licenses was used in California in a voter initiative that banned gill nets in California waters. CAL. CONST. art. XB, §§ 1-16. California voters adopted the Marine Resources Protection Act of 1990 which initially limited the use of gill nets and trammel nets in certain California waters, and eventually banned the use of such nets in those waters on January 1, 1994. *Id.* § 3. In passing the California net ban, the voters also implemented a license buy-back program. *Id.* § 7. Because section 7 required enabling legislation to put this program in motion, the California Legislature passed section 8610.7 of the *California Fish and Game Code*. *Id.* § 7(d); CAL. FISH & GAME CODE § 8610.7 (Deering Supp. 1995). This program is funded in part through three dollar surcharges on certain fishing licenses and in part through contributions and donations from those wishing to contribute to the buy-back program. *Id.* § 8610.8(c)-(e).

21. *See* State v. Lee, 41 So. 2d 662, 663 (Fla. 1949) (holding that taking or use of wild animals, ferae naturae, for private purposes is subject to governmental regulation for the

tional amendment overturned are claiming that the fishermen have property rights in their nets and that they have a liberty interest in the right to fish.[22] The Circuit Court of the Second Judicial Circuit in and for Leon County, Florida recently refused to grant a temporary injunction that would have kept the amendment from going into effect on July 1, 1995.[23] Although it did not rule on the merits of the case, the court expressed its opinion that

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general good); Sylvester v. Tindall, 18 So. 2d 892, 898 (Fla. 1944) (explaining that "[t]he State has a sovereign right, and a consequent sovereign duty," with regard to game and fish conservation); Nash v. Vaughn, 182 So. 827, 828 (Fla. 1938) (stating that fish are ferae naturae and are owned by the state when in a state of freedom for the public).

22. *See* Complaint at 10-12, Lane v. Chiles, No. 95-2972 (Fla. 2d Cir. Ct. filed June 20, 1995). Another lawsuit has been filed against local television stations seeking damages for the airing of paid political announcements paid for by net ban proponents. Dee Rivers, *Florida Net Ban Goes into Effect*, NAT'L FISHERMAN, Sept. 1995, at 13, 72. The claim is that these commercials contained falsehoods about the Florida net fishing industry. *Id.* One of the advertisements showed footage of a University of Georgia study of shrimp trawl bycatch. Letter from David L. Harrington, Associate Director, University of Georgia Marine Extension Service (Nov. 7, 1994) (on file with Nova Law Review) [hereinafter Letter from David L. Harrington]. "Bycatch," also known as "by-kill," is a term used to describe the fish that are unintentionally caught through the net fishing process. *Florida's Bycatch Reflects Global Emergency*, FLA. SPORTSMAN, Nov. 1994, at 22, 22. David L. Harrington of the University of Georgia Marine Extension Service indicated that the footage shown to Florida voters was not a true representation of the situation in Florida. Letter from David L. Harrington, *supra*. According to Harrington, they "were testing . . . in an area where no sensible fishermen would trawl when this particular video footage was filmed." *Id.*

Other arguments being made center around the subject matter of this amendment and the sufficiency of the explanation of the amendment placed on the voting ballot. Complaint at 8-10, *Lane* (No. 95-2972). These two issues were considered by the Supreme Court of Florida prior to the November 8, 1994 election pursuant to the *Florida Constitution*. *See* Advisory Opinion to the Attorney General Limited Marine Net Fishing, 620 So. 2d 997 (Fla. 1993). The court ruled in favor of the sport fishermen. *Id.* at 999.

For an interesting discussion of possible constitutional arguments against the amendment, see Alexandra M. Renard, *Will Florida's New Net Ban Sink or Swim?: Exploring the Constitutional Challenges to State Marine Fishery Restrictions*, 10 J. LAND USE & ENVTL. L. 273 (1995).

23. Order Denying Motion for Temporary Injunction, Lane v. Chiles, No. 95-2973 (Fla. 2d Cir. Ct. decided June 29, 1995). The Circuit Court of the Second Judicial Circuit in and for Leon County, Florida denied the motion for temporary injunction on the grounds that the plaintiffs failed to prove the existence of the four elements necessary for the issuance of a temporary injunction. *Id.* at 2. The court said that there was no proof that there was no adequate remedy at law, that irreparable harm will result if the injunction is not granted, that they were likely to succeed on the merits of the case, and that the injunction will serve the public interest. *Id.* at 2-4 (citing City of Jacksonville v. Naegele Outdoor Advertising Co., 634 So. 2d 750 (Fla. 1st Dist. Ct. App. 1994), *aff'd*, 659 So. 2d 1046 (Fla. 1995)).

a regulatory takings argument would likely prove unsuccessful.[24] If the court decides in favor of the commercial fishermen on the takings issue once the full case is heard on its merits, the state will be required to compensate the fishermen for their losses related to the net ban. Until that time, however, the only type of compensation that these fishermen can receive from the State of Florida will come from legislatively enacted compensation programs.

In response to the call for compensation, the Florida Legislature passed House Bill 1317, the "Net Ban Assistance Program," on June 18, 1995.[25] The purpose of this program, which is to be administered and enforced by the Florida Department of Labor and Employment Security ("DLES"), is "to provide economic assistance to commercial saltwater products licensees suffering certain losses in income as a result of the amendment, to purchase commercial fishing gear rendered illegal or useless by the amendment, and to retrain commercial fishermen economically displaced by the amendment."[26] "Every person, firm, or corporation which sells, offers for sale, barters, or exchanges for merchandise any saltwater products, or which harvests saltwater products with certain gear or equipment as specified by law, must have a valid saltwater products license."[27] In restricting eligibility for economic assistance to holders of saltwater products licenses, the legislature apparently has pinpointed the group that it believes will be

24. *Id.* at 5-6.

25. Ch. 95-414, 1995 Fla. Sess. Law Serv. at 2660 (to be codified at FLA. STAT. § 370.0805).

26. *Id.* § 1, 1995 Fla. Sess. Law Serv. at 2661 (to be codified at FLA. STAT. § 370.0805(1)(a)).

27. Ch. 95-148, § 983, 1995 Fla. Sess. Law Serv. 773, 1155 (West) (amending FLA. STAT. § 370.06(2)(a)). Such licenses can be issued in the name of an individual or to a valid boat registration number. *Id.* The fees for such licenses are $50 and $100 respectively. *Id.* Where the license is attached to an individual's name, no other fisherman can legally sell fish to a licensed wholesale dealer under that license. Telephone Interview with Ken Baer, Legislative Liason, DLES, Division of Unemployment Compensation (Aug. 14-15, 1995) [hereinafter Interview with Ken Baer]. In contrast, the license that is registered to a vessel allows multiple fishermen to work on the boat. *Id.* The fishermen will then make arrangements as to how much they each make for their aggregate fishing activities. *Id.* Technically, the catches are being sold by the boat, allowing the fishermen to fish without a license. *Id.* A team of fishermen could choose to share the cost of a boat and the attached license, or the boat owner could choose to hire fishermen to work off his boat for a percentage of the catch. *Id.* Similarly, several individual licensees could choose to work from one vessel, each with the ability to sell his own catch. Interview with Ken Baer, *supra.*

most harshly affected by this net ban and which it can afford to compensate.[28]

The two major economic assistance programs created by Florida House Bill 1317, which are the focus of this note, are the "net buy-back program" and "economic assistance for loss of income" programs. Economic assistance is to come in the way of retroactive unemployment compensation under chapter 443 of the *Florida Statutes*.[29] The buy-back of nets is to be funded through an appropriation of twenty million dollars to the Seafood Workers Economic Assistance Account within the Special Employment Security Administration Trust Fund.[30] Additionally, the bill acts to clarify the eligibility of the displaced fishermen for Job Training Partnership Act ("JTPA") services.[31] The JTPA was passed by the federal government

> to prepare youth and adults facing serious barriers to employment for participation in the labor force by providing job training and other services that will result in increased employment and earnings, increased educational and occupational skills, and decreased welfare dependency, thereby improving the quality of the work force and enhancing the productivity and competitiveness of the Nation.[32]

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28. Other groups of people who will be adversely affected by this net ban were to be given economic assistance in early versions of this assistance plan. Fla. HB 1317, § 1 (draft of Mar. 7, 1995). Evidently, the legislature believed that the state could not support a compensation program that would have allowed more of those who will be affected by the ban to receive financial assistance. The original version of House Bill 1317 would have provided compensation to wholesale and first level retail saltwater product dealers who are licensed under section 370.07 of the *Florida Statutes*. *Id.*

Although the net ban amendment will directly affect the net fishermen, those who make a living buying and selling fish from commercial fishermen are losing a valuable source of income. Many fish markets deal primarily in the types of fish that are caught using gill nets and will be forced to buy and sell more expensive types of fish to compensate for the loss in supply. These stores sell to low income customers who will most likely be unable to absorb the increased prices. *See* Robert Johnson, *Economic Focus: Fish Industry, Consumers Feel Bite From Net Ban*, WALL ST. J., Oct. 4, 1995, at F1 (discussing the adverse effects that have been felt since the net ban went into effect).

29. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2662 (to be codified at FLA. STAT. § 370.0805(4)(a)).

30. *Id.* § 3, 1995 Fla. Sess. Law Serv. at 2664.

31. *Id.* § 1, 1995 Fla. Sess. Law Serv. at 2661 (to be codified at FLA. STAT. § 370.0805(1)(b)). Because the focus of this paper is the state programs which have been created to assist the fishermen in making the transition away from gill net fishing and into both related and unrelated professions, the intricacies of the Job Training Partnership Act will not be addressed.

32. 29 U.S.C. § 1501 (Supp. V 1993).

The legislature has also directed various state agencies and private economic development entities to make a concerted effort to create new employment opportunities in related fields or other unrelated industries for the fishermen who have lost their livelihoods as a result of this ban.[33] Finally, there is a call to the Department of Environmental Protection to work with the Department of Commerce and the Department of Community Affairs to identify grant and low interest loan programs that would be available to fishermen who would like to stay in the fishing industry but who will need capital in order to fund the conversion of their existing equipment into legally permissible fishing equipment.[34]

To make the economic assistance program most effective for those who have been directly affected by the net ban, the Florida Legislature saw the need to create eligibility restrictions which would control the number of people who could qualify for unemployment compensation. Besides the licensing requirements mentioned above, anyone who has violated a Marine Fisheries Commission rule or any provision under chapter 370 of the *Florida Statutes* three or more times in a single license year since 1991, or more than four times between 1991 and 1995, inclusive, is ineligible for benefits under these programs.[35] Additionally, the fisherman must have been a resident of Florida on November 8, 1994, the date of the election in which article X, section 16 of the *Florida Constitution* was passed by

33. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2661 (to be codified at FLA. STAT. § 370.0805(1)(c)). The focus of this note does not allow for an in-depth discussion of the various programs referenced in the net ban assistance plan. For information regarding available training and retraining services, fishermen can go to their local Jobs and Benefits office or Private Industry Council, or can contact Sonya Seay by phone at (800) 633-3572 and by mail at Division of Jobs and Benefits, 1320 Executive Center Drive, Suite 200, Atkins Building, Tallahassee, Florida 32399-0667. FLA. DEP'T LABOR & EMPLOY. SEC., NET FISHING FACTS 2 (June 1995) [hereinafter NET FISHING FACTS].

34. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2661 (West) (to be codified at FLA. STAT. § 370.0805(1)(d)). Those interested in information regarding small business loans and other government assisted financing programs should contact the Florida Department of Commerce at (800) 342-0771, (904) 922-8639, or (904) 488-9357. NET FISHING FACTS, *supra* note 33, at 3.

35. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2661 (to be codified at FLA. STAT. § 370.0805(2)(a)). The constitutional amendment prescribes penalties for violation of the net ban. FLA. CONST. art. X, § 16(e). Violators are to punished pursuant to the penalties stated in § 370.021(2)(a), (b), (c)6. & 7., and (e) of the *Florida Statutes*. *Id.* The penalties come in the form of fines, imprisonment, and the suspension or revocation of fishing licenses. FLA. STAT. § 370.021 (Supp. 1994).

Florida voters.[36] One rationale for the residency requirement might be to keep fishermen from other states from coming to Florida to sell nets that had previously been banned in their respective states, and for which there were no programs implemented to buy-back the nets.[37] With regard to the net buy-back program, only those nets which were useable on June 30, 1995 and which have been rendered illegal by the amendment can be sold back to the state.[38]

Applications for unemployment compensation or to sell back illegal nets are being taken on a "first-come, first-served basis."[39] Holders of saltwater product licenses have until December 31, 1995 to apply with the DLES in order to receive unemployment benefits under this plan.[40] Those with saltwater products licenses and those with resident commercial fishing licenses under section 372.65 of the *Florida Statutes* could begin to apply for net buy-back assistance on July 1, 1995 and have until December 31, 1995 to utilize the program.[41] Given that a finite amount of money has been appropriated for the buy-back program, it behooves the fishermen to apply as soon as possible to sell back their nets.[42]

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36. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2661 (to be codified at FLA. STAT. § 370.0805(2)(b)).

37. For example, when the Texas Legislature banned the use of gill nets in Texas waters in 1988, the government did not create a net buy-back program. FLA. DEP'T LABOR & EMPLOYMENT SEC., A REPORT TO THE GOVERNOR AND LEGISLATURE: ECONOMIC ASSISTANCE AND RETRAINING NEEDS RESULTING FROM THE NOVEMBER 8, 1994 PASSAGE OF CONSTITUTIONAL AMENDMENT 3 (NET FISHING BAN), vol. 2 at 64-65 (Feb. 1995) [hereinafter ECONOMIC ASSISTANCE AND RETRAINING NEEDS]. These fishermen were left with nets that could not be transformed into legally useable nets for other purposes and which had no resale value. *Id.* at 65.

38. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2663 (to be codified at FLA. STAT. § 370.0805(5)(b)).

39. *Id.* § 1, 1995 Fla. Sess. Law Serv. at 2661 (to be codified at FLA. STAT. § 370.0805(3)(a)).

40. *Id.*

41. *Id.* § 1, 1995 Fla Sess. Law Serv. at 2661-62 (to be codified at FLA. STAT. § 370.0805(3)(b)).

42. There has been some concern over fishermen choosing to delay their applications for the net buy-back program until the Florida courts have ruled on the legality of this constitutional amendment. Waiting to apply may result in a loss of compensation for their now illegal nets. Those involved with the net buy-back program are encouraging all eligible fishermen to apply now so as to improve their chances of reaping some economic benefit before the funds run out. Telephone Interview with Sharon Barney, Seafood Industries Specialist, Netban Task Force, Div. of Labor, Employ., and Training, Fla. Dep't of Labor & Employ. Sec. (Aug. 15, 1995) (Barney is one of many commercial fishers that have been employed by the DLES to assist in the application for net buy-backs and unemployment

A. *Economic Assistance for Lost Income*

As noted above, the economic assistance for lost income resulting from the net ban is to come from the Unemployment Compensation Trust Fund ("Fund").[43] Under this new legislation, those who hold valid saltwater products licenses can apply for retroactive elective coverage, pursuant to section 443.121(3)(a), by paying unemployment taxes to the state Fund.[44] What this means is that the failure on the part of fishermen to pay unemployment taxes prior to becoming unemployed does not deny them of the right to claim unemployment benefits.[45]

One might ask why it was necessary for the legislature to affirmatively state that these fishermen can now become eligible for unemployment coverage, and why it is that these fishermen are not already eligible to receive unemployment benefits. The reason that it was necessary for the legislature to enact legislation which enables fishermen to claim unemployment benefits is that the fishing industry is not presently covered by the laws that govern unemployment compensation.[46] Section 443.036(19)(n) of the *Florida Statutes* explains that certain jobs do not constitute "employment" so as to qualify the worker for unemployment compensation.[47] Fishing is one of those excluded professions.[48] Thus, fishermen do not

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compensation.) [hereinafter Interview with Sharon Barney].

43. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2662 (to be codified at FLA. STAT. § 370.0805(4)(a)).

44. FLA. STAT. § 443.121(3)(a) (1993).

45. A question that arises when considering the use of unemployment compensation to support these commercial fishermen, is why should someone who has never contributed any money to the Fund now be able to come forward and collect unemployment benefits that will essentially be paid for by all those who have supported the Fund in years past? It seems unfair to those who have been forced by law to pay into the Fund to have to support a group of individuals who were not intended to receive unemployment benefits. While this is a valid concern that might be considered in the future by lawmakers, there is nothing in the present unemployment compensation system that prohibits retroactive elective coverage.

46. *Id.* § 443.036(19)(n)(3) (Supp. 1994).

47. *Id.* § 443.036(19)(n).

48. *See id.* § 443.036(19)(n)(3). This subsection explains that:

> Service performed by an individual in, or as an officer or member of the crew of a vessel while it is engaged in, the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including service performed by any such individual as an ordinary incident to any such activity, except:
>
> a. Service performed in connection with the catching or taking of salmon or halibut for commercial purposes.
>
> b. Service performed on, or in connection with, a vessel of more than 10 ten net tons. . . .

qualify for unemployment benefits, and there is no requirement that fishermen with employees pay taxes to the fund. Also, those fishermen who work independently do not have to pay unemployment taxes because the self-employed cannot receive unemployment compensation.[49] Given that the law does not mandate the coverage of fishermen or the self-employed, any fisherman who wants to collect unemployment must now retroactively "elect" coverage pursuant to section 443.121(3)(a).[50]

Members of the Florida Legislature questioned representatives of the federal government as to the legality of retroactive elective coverage when it was considering the passage of this plan.[51] Initially, the federal government officials were skeptical about the legality of such a program.[52] The federal government was concerned about the detrimental effect that widespread use of retroactive elective coverage could have on the resources available to pay out unemployment benefits.[53] Just as insurance companies would be unable to survive if a law was passed which required them to write policies for those who have already suffered injury, so too would the national unemployment system run out of money in the event that anyone could qualify for unemployment compensation retroactively.

Upon review of current federal unemployment compensation law, however, the federal government officials were unable to locate any provision that would prohibit an individual from retroactively electing coverage.[54] Given the harmful effect that this net ban will have on those fishermen who have spent their lives fishing and who will have difficulty making a transition into a new profession, the federal government officials

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Id.

There was some initial concern by those who represent the commercial fishing industry that Florida fishermen who own ten-ton boats would not be able to apply for unemployment compensation. Many of these fishermen have not made the required contributions to the Fund. The commercial fishermen have been assured by the state that the failure to abide by this law, which apparently was never strictly enforced, does not deny the boat owner of eligibility. Interview with Sharon Barney, *supra* note 42.

49. *See* Hartenstein v. Florida Dep't of Labor & Employ. Sec., 391 So. 2d 386, 387 (Fla. 2d Dist. Ct. App. 1980) (holding that self-employment does not constitute "employment" under chapter 443 of the *Florida Statutes*).

50. FLA. STAT. § 443.121(3)(a) (1993).

51. Interview with Ken Baer, *supra* note 27.

52. *Id.*

53. *Id.*

54. *Id.* According to Mr. Baer, the United States Department of Labor, Legislative Review Office was consulted. After reviewing the Federal Unemployment Tax Act and the Social Security Act, that office concluded that retroactive elective coverage is permissible. *Id.*

agreed that unemployment compensation would be an acceptable way to allow these individuals to be compensated while they seek replacement work.[55] Florida is thus currently the only state in the country with a plan that allows for the use of retroactive elective coverage.[56] Arguably, if this ban directly affected a larger group of people than it appears it will affect, the federal government officials might have fought harder against retroactive elective coverage.

Every person who is eligible to receive unemployment compensation, whether by law or by election, receives between ten and twenty-six weeks of unemployment compensation.[57] The duration of benefits is determined by looking at the number of weeks that an individual has worked during his "base period."[58] The base period is the "first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year."[59] The benefit year is the "1-year period beginning with the first day of the first week with respect to which the individual first files a valid claim for benefits . . . ."[60] What this means is that if fisherman X applied for benefits on July 1, 1995, the length of time that he will receive benefits will depend upon the number of weeks in which X worked during his base period beginning April 1, 1994 and ending March 31, 1995. If X makes contributions to the Fund for the fifty-two weeks in which he worked his gill nets off the Naples, Florida coastline between April 1, 1994 and March 31, 1995, he is entitled to twenty-six weeks of unemployment compensation. A claimant receives benefits for the period equal to half the number of weeks worked during his base period.[61] The law requires that the individual who is claiming unemployment benefits have been employed at least twenty weeks during the applicable base period.[62] Thus, another commercial fisherman, who only worked twenty weeks during that same base period would only be entitled to the minimum ten weeks of benefits.

The calculation of the weekly benefit amount that a claimant is entitled to receive is based on the average amount of wages paid to that claimant weekly throughout his base period.[63] The claimant receives one-half of his

55. Interview with Ken Baer, *supra* note 27.
56. *Id.*
57. FLA. STAT. § 443.111(4)(a)1.; Interview with Ken Baer, *supra* note 27.
58. FLA. STAT. § 443.111(4)(a)(1).
59. *Id.*
60. *Id.* § 443.036(6).
61. *Id.* § 443.111(4)(a)1.; Interview with Ken Baer, *supra* note 27.
62. Interview with Ken Baer, *supra* note 27.
63. FLA. STAT. § 443.111(2)(a).

average weekly wage, biweekly, for the duration of his benefit year.[64] The minimum amount that one can receive in benefits is $10 and the maximum is $250, meaning that a person who earns less than $20 per week is ineligible.[65] Using this formula, if X (from the example above) earned $26,000 during his fifty-two week base period, he would receive the maximum $250 per week for the twenty-six weeks in his benefit year. The $26,000 salary he received is divided by fifty-two, resulting in an average weekly wage of $500 and a weekly benefit amount of $250 for twenty-six weeks. Pursuant to the law, X will receive a check in the amount of $500 every two weeks for twenty-six weeks.

In order to buy into the Fund, the fisherman will have to pay contributions equal to 2.7% of the first $7000 of gross wages.[66] For a fisherman who earned in excess of $7000 in gross pay during his base period, the maximum contribution for the year will be $189.[67] The fisherman who earns below $7000 during his base period pays a lesser amount in taxes because his benefits will be less than that received by a higher paid individual.

Under the loss of income assistance plan, an individual fisherman can elect to be covered for the years 1994 and 1995.[68] Because of the July 1, 1995 start up date for the loss of income assistance program, a fisherman who elects coverage only for his 1994 landings can receive a maximum of nineteen weeks of full benefits. There is a maximum of thirty-nine possible weeks in which this fisherman could have possibly worked between April 1, 1994 and December 31, 1994, the period of time in which he would be able to claim unemployment if he filed a claim on July 1, 1995.[69] Partial benefits are paid to the claimant for the thirty-ninth week.[70]

One rationale for only claiming the weeks worked in 1994 may be that the fisherman did not earn an appreciable amount in the first calendar quarter of 1995, which would be the fourth calendar quarter in the base period for a fisherman applying on July 1, 1995. By disregarding the time he worked in 1995, he will be able to avoid paying unemployment taxes to the Fund for work done in 1995 and will be able to increase his average weekly payment of benefits. Although he will receive benefits for a shorter

64. *Id.* § 443.111(1)(b), (2)(a).
65. *Id.* § 443.111(2)(a).
66. *Id.* § 443.131(2)(a); NET FISHING FACTS, *supra* note 33, at 1.
67. NET FISHING FACTS, *supra* note 33, at 1.
68. *See id.*
69. Interview with Ken Baer, *supra* note 27.
70. *Id.*

period of time than he would if he elects both 1994 and 1995 coverage, the fisherman may have financial obligations for which he needs to receive the maximum amount of benefits for which he is eligible.

The fisherman who was unable to work the minimum twenty weeks required to receive benefits in 1994 does not have the option of electing only for 1994 coverage. He will need to use the weeks he worked in 1995 to qualify for unemployment benefits. The fisherman who chooses, or is forced, to elect coverage for both the 1994 and 1995 calendar years will be required to pay up to $378 in taxes to initiate his benefits, depending upon how much he made in 1994 and 1995. Again, the fisherman is required to make contributions equal to 2.7% of the first $7000 of gross income he earned in a given year. The maximum of $378 would be required of a fisherman who earned in excess of $7000 in both years.

Electing coverage for only the 1995 calendar year is not an option for someone applying prior to October 1, 1995 because that individual will not have been able to work the minimum twenty weeks required for eligibility. This may be the only choice for a fisherman who was unable to work during the latter part of 1994, and may be the best choice for the fisherman who made little money in 1994, but was having a prosperous 1995 net fishing season up until the time that the net ban went into effect. By applying after October 1, 1995, the latter fisherman gains an additional thirteen weeks to increase his 1995 earnings. The result is that both his average weekly wage and duration of benefits will increase. Ken Baer, an employee of the DLES, Division of Unemployment Compensation, explained that the department is using all the income that the commercial fisherman brought in during the applicable base period to arrive at the average weekly wage that is used in calculating how much a fisherman is entitled to receive.[71] At first glance, the language contained in section 370.0805(4)(a) appears to suggest that only recorded landings of species affected by the net ban will be used to determine earnings during the base period.[72] However, a closer reading of the text indicates the fisherman must only show that at least some of his income during the base period came from sales of affected species.[73]

In the event that a fisherman's average weekly wage cannot be determined by using the formula stated above, section 370.0805(4)(b) directs the DLES to calculate unemployment wages by "multiplying [the] total pounds of catch per calendar year as recorded on trip tickets by the

71. *Id.*

72. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2662 (to be codified at FLA. STAT. § 370.0805(4)(a)).

73. *Id.*

unadjusted average annual coded species-grouping values published in the Marine Fisheries Information System's Annual Landings Summary" limited to certain enumerated species.[74] The DLES is instructed to use only income generated from catches of the affected species of fish.[75] However, in an effort to replace as much of the eligible fisherman's lost income as possible, the DLES is using any income generated by a fisherman during his

74. *Id.* § 1, 1995 Fla. Sess. Law Serv. at 2662 (to be codified at FLA. STAT. 370.0805(4)(b)). Every time a commercial fisherman sells his catch to a dealer, a trip ticket must be filled out by the dealer buying the fish. ECONOMIC ASSISTANCE AND RETRAINING NEEDS, *supra* note 37, vol. II at 79-80. The information contained on these tickets is used primarily for conservation purposes by the Marine Fisheries Commission. *Id.* The mandatory information entered on these tickets, which includes the fisherman's saltwater products license number, the wholesale or retail seafood dealer's license number, the date of the sale, the amount of time spent fishing, the range of counties in which the species is usually caught, the type of gear used and how much of it used, species codes, size codes, and total amount caught, allows for the development of fishing quotas and restricted fishing areas. *Id.* This data, along with other non-mandatory data (area fished, depth, unit price, and dollar value), is invaluable to the DLES in determining the amount of benefits due to the fisherman. By using the average price that has been paid throughout the state for the specific species affected by the ban and the landing information entered on the trip tickets, the DLES can establish how much unemployment compensation is due to a particular fisherman during his benefit year.

The "average annual coded species-grouping values" are average prices for which the various species of fish caught in the state are sold for by commercial fishermen. Interview with Ken Baer, *supra* note 27. A term that is used synonymously with annual coded species-grouping value is "ex-vessel value." *Id.* Just as the price of orange juice rises and falls on the commodity markets, so too does the price of fish in the fish markets. By using an average value, the DLES can democratically issue benefits to the affected commercial fishermen who have elected coverage.

The following is a list of species under § 370.0805(4)(b) which represent the types of fish that are most commonly caught with the types of nets that have been banned as a result of the amendment: bait fish, ballyhoo, bluefish, bluerunner, croaker, black drum, flounders, grunts, jacks, ladyfish, Spanish mackerel (if landed on Florida's west coast), menhaden (if landed on Florida's east coast or in Tampa Bay), mullet, pinfish, pompano, Spanish sardines (not landed in Tampa Bay), scaled sardines, scad, shad, sheepshead, spot, seatrouts, whiting, miscellaneous industrial fish, white shrimp, Spanish mackerel (landed on Florida's east coast and for which trip ticket amounts do not exceed 1500 pounds per ticket), brown shrimp (if trip ticket amounts do not exceed 500 pounds per ticket), pink shrimp (if trip ticket amounts do not exceed 500 pounds per ticket), and bait shrimp (landed on Florida's east coast). Ch. 95-414, § 1, 1995 Fla. Sess. Law. Serv. at 2662-63 (to be codified at FLA. STAT. § 370.0805(4)(b)1.- 29.).

75. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2663 (to be codified at FLA. STAT. § 370.0805(4)(c)).

base period.[76] The goal is to help replace as much of the eligible fisherman's lost income as possible.

Partial unemployment benefits are available to a fisherman who is working only part-time and whose weekly income generated from that part-time job is less than his weekly benefit amount.[77] The amount of income generated from the part-time job is subtracted from his weekly benefit amount.[78] Additionally, if a person finds a temporary job, his benefits can be postponed until the job has ended.[79] Presently, some of these fishermen who have been employed by the DLES to assist in implementing the net buy-back assistance program are utilizing the postponement option.[80]

The final eligibility requirement for this economic assistance program is that the fisherman must also be accepted and enrolled in an approved training program or have completed such a program, or be registered in a DLES job search program.[81] This requirement is not unique to this program. Anyone who makes a claim for unemployment benefits has the duty to look for a suitable replacement for his lost job.[82] Unemployment compensation is intended to sustain an individual who has lost his job and is not meant to be a replacement for employment. To insure that the individual is making an effort to find replacement employment, individuals are required to report the status of job searches to the DLES, Division of Unemployment Compensation.[83] Failure to do so will render the claimant ineligible for future benefit checks.[84]

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76. Interview with Ken Baer, *supra* note 27.

77. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2662 (to be codified at FLA. STAT. § 370.0805(4)(a)); FLA. STAT. § 443.111(3)(b) (Supp. 1994).

78. Interview with Ken Baer, *supra* note 27.

79. *Id.*

80. *Id.*

81. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2663 (to be codified at FLA. STAT. § 370.0805(4)(d)). Approved training programs include aquaculture research and training programs, opportunities under the Job Training Partnership Act, DLES employment programs, or courses offered at state universities, community colleges, and vocational schools. *Id.*

82. FLA. STAT. § 443.111(1)(b).

83. *Id.* Every two weeks the claimant must report as to the status of his job search. If he fails to do so, he is not eligible to receive further benefit checks. He is required to "attest to the fact that he is able and available for work, has not refused suitable work, and is seeking work and, if he has worked, to report earnings from such work." *Id.*

84. *Id.*

B. *The Net Buy-Back Program*

The legislature created the net buy-back program to compensate the owners of nets which have been rendered illegal or useless by the passage of Amendment Three. "The primary goals of equipment buy outs are to ensure compliance with new fishing restrictions and to equitably recompense the fishers' capital investment in their gear."[85] This buy-back program has been limited to the compensation of only those commercial saltwater product licensees and resident commercial fishing licensees "who can document an annual gross income of $2500 or more from net-caught landings of saltwater products during the period beginning July 1, 1991, and ending June 30, 1995."[86] The net buy-back program's expansive coverage allows both saltwater products license holders and freshwater commercial fishermen to sell back their nets.[87] However, the lost income assistance discussed above is only available to saltwater commercial fishermen. In order to sell freshwater fish, a resident commercial fishing license must be obtained at a cost of $25.[88] It is unclear why the buy-back program is open to both groups of people while unemployment is only available to the one group.[89]

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85. ECONOMIC ASSISTANCE AND RETRAINING NEEDS, *supra* note 37, vol. I at 5. In this report the DLES, expressed concerns over the temptation to continue to use the gill nets because of the absence of substitute employment. *Id.* at 40. Additional concern was raised over the possibility that these nets might be discarded in ways that are detrimental to the environment. *Id.* Fishermen might cast them into the ocean or deposit them in a nearby wooded area. *Id.* By offering to purchase these nets, the state can better prevent this type of activity from occurring.

86. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2663 (to be codified at FLA. STAT. § 370.0805(5)(a)).

87. Four families living on the St. Johns River in northern Florida are eligible to sell their nets back because they have recorded landings of affected species. Some of the affected species (e.g., mullet) swim up the river into brackish water and were caught by these families using gill nets and the like. Given that one of the main goals of the constitutional amendment was to control the harvesting of depleting fish populations, it is beneficial for the state to buy-back these nets as well. Interview with Ken Baer, *supra* note 27.

It is unfortunate that these families are not eligible for retroactive elective unemployment coverage because they are being directly affected by this net ban. When the net ban assistance plan went into effect on July 1, 1995, one of these families applied for retroactive coverage and was denied. The Governor's office has been notified of this situation and efforts are being made to solve the problem. Ken Baer, from the DLES, believes that in the rush to get the programs passed before the regular session ended, the legislature overlooked these families. *Id.*

88. FLA. STAT. § 372.65(1)(a) (1993).

89. The Final Bill Analysis and Economic Impact Statement, prepared by the Florida House of Representatives, Committee on Commerce, does not shed any light on the

Two possible explanations center around enforcement and conservation concerns. Because there are concerns that some fishermen will not honor the ban, purchasing nets from as many people as possible reduces the threat that the nets will continue to be used.[90] The buy-back of the nets also helps insure their safe disposal.[91] After examining trip ticket data compiled by the Department of Environmental Protection, the DLES determined that it could help those most harmed by the net ban if it limited eligibility to those who used net fishing as their primary source of income.[92] The DLES concluded that a threshold level of $2500 per year would separate those earning a living through net fishing and those purchasing fishing licenses for other purposes.[93] A substantial number of those who own saltwater product licenses are recreational fishermen who purchase their licenses to circumvent size limits and bag limits which are more restrictive on recreational fishing.[94] There are others who do in fact use their licenses for commercial purposes, but only as a means of supplementing their income.[95] Of the 6103 fishermen who held commercial licenses in 1991 and who had landings of affected species, 1699 had average yearly landings exceeding $2500 in value.[96] By focusing on a smaller group of individuals, the legislature apparently feels that it can best use the money that has been appropriated to fund this buy-back program. The maximum number of nets a single license holder can sell back is predicated upon the "licensee's average annual gross income attributable to the sale of eligible saltwater products during the 3-year period of July 1, 1991, through June 30, 1994."[97] Unlike the lost income assistance program, the DLES is using only the income produced through landings of affected species to compute the average income level of the fisherman.[98]

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legislature's reasoning. *See* Fla. H.R. Comm. on Com., HB 1317, Second Engrossed (1995) Staff Analysis (final June 18, 1995) (on file with comm.) [hereinafter Com. Comm. HB 1317 Staff Analysis].

90. ECONOMIC ASSISTANCE AND RETRAINING NEEDS, *supra* note 37, vol. I at 40.

91. *Id.*

92. *Id.*

93. *Id.* at 42.

94. Interview with Ken Baer, *supra* note 27.

95. *Id.*

96. ECONOMIC ASSISTANCE AND RETRAINING NEEDS, *supra* note 37, vol. 1 at 42.

97. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2663-64 (to be codified at FLA. STAT. § 370.0805(5)(c)). The term "eligible saltwater product" appears to be synonymous with the term "affected species" used elsewhere in the statute. Again, these are the species of fish that have traditionally been caught with gill nets and other entangling nets.

98. Interview with Ken Baer, *supra* note 27.

The DLES is using any type of documentation that the fisherman can produce to substantiate his landings of affected species over the past four years.[99]

It is interesting to note that the time period used to determine average income for purposes of establishing which fishermen are eligible to sell their nets back differs from the time period used to calculate the average income figure which determines the number of nets a fisherman can sell. The latter average income figure is computed by averaging only three years of gross income as opposed to four. The result allows some of the eligible fishermen to sell back more nets solely because their first three years of fishing during the designated period were more profitable. By excluding the July 1, 1994 through June 30, 1995 fishing season, those fishermen who had low yearly earnings during one of the first three years of the general eligibility period are disadvantaged. The fishermen who did better in the first three years of the period have the advantage of being able to exclude the worst of the four years, but the fishermen who earned the most in the last year do not enjoy the benefit of their success. The result is that not everyone pinpointed to receive economic assistance is being given the same opportunity to cut his or her losses. According to Ken Baer, this situation could not be helped.[100] When this program was being considered by the legislature, it became apparent that the 1994 and 1995 data would not be available for use.[101]

The minimum amount of nets which can be sold under this program is four and the maximum is ten.[102] Licensees who made between $2500 and $4999 can sell the minimum four nets.[103] Those earning more than $5000 but less than $10,000 may sell back six nets.[104] Those with incomes exceeding $10,000 but lower than $20,000 may sell as many as eight

99. *Id.* The DLES is accepting trip tickets, notarized landing journals, catch receipts, share settlements, crew share receipts, etc. *Id.* Share settlements reflect the amount caught by those fishing together and the amount of fish that went to each fisherman. *Id.* Similarly, a crew share receipt will show how much a crewmember made for a given fishing trip. *Id.*

100. Interview with Ken Baer, *supra* note 27.

101. *Id.* Baer explained that the 1994 data was not available until June, 1995. It would not be possible to get the data for the first part of 1995, and thus incomes for the July 1, 1994 through June 30, 1995 fishing season could not be computed. *Id.*

102. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2663-64 (to be codified at FLA. STAT. § 370.0805(5)(c)).

103. *Id.* § 1, 1995 Fla. Sess. Law Serv. at 2663 (to be codified at FLA. STAT. § 370.0805(5)(c)1.).

104. *Id.* § 1 (to be codified at FLA. STAT. § 370.0805(5)(c)2.).

nets.[105] Anyone earning over $20,000 but less than $30,000 is also eligible to sell eight nets.[106] Licensees who average over $30,000 per year may sell the maximum ten nets.[107] The DLES found a positive correlation between incomes and the number of nets owned by a particular fisherman.[108] All licensees are limited to selling back two shrimp trawls.[109] Putting a cap on the number of nets that can be sold was important because of the concern that a market might be created for the illegal nets.[110] The DLES was concerned that fishermen would import worthless nets from fishermen in other states to be sold in the buy-back program.[111] Such activity would likely limit the number of fishermen who could recover under this program.

A nonnegotiable figure has been attached to each type of net which the state is willing to buy back.[112] Two different proposals for administering the buy-back program were presented by the DLES.[113] The state could have chosen to appraise each net and attach a value to it or it could have attached a nonnegotiable price to each type of net eligible for buy-back.[114] The latter plan is financially more attractive because there is less administrative cost attached to it.[115] Past programs implementing an appraisal system have encountered legal problems.[116] Such a problem could arise if a fisherman, unhappy with the value attached to his nets, decides to go to court to challenge the appraisal. The increased costs resulting from

105. *Id.* § 1 (to be codified at FLA. STAT. § 370.0805(5)(c)3.).

106. *Id.* § 1, 1995 Fla. Sess. Law Serv. at 2664 (to be codified at FLA. STAT. § 370.0805(5)(c)4.).

107. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2664 (to be codified at FLA. STAT. § 370.0805(5)(c)5.).

108. ECONOMIC ASSISTANCE AND RETRAINING NEEDS, *supra* note 37, vol. I at 42.

109. Ch. 95-414, § 1, 1995 Fla. Sess. Law. Serv. at 2664 (to be codified at FLA. STAT. § 370.0805(5)(d)).

110. ECONOMIC ASSISTANCE AND RETRAINING NEEDS, *supra* note 37, vol. I at 42-43.

111. *Id.* at 43.

112. Ch. 95-414, §1, 1995 Fla. Sess. Law Serv. at 2663 (to be codified at FLA. STAT. § 370.0805(5)(a)). The legislature affirmatively stated in the statute that this nonnegotiable figure is not a reflection of the actual value of such a net in the retail market. *Id.*

113. ECONOMIC ASSISTANCE AND RETRAINING NEEDS, *supra* note 37, vol. I at 42.

114. *Id.*

115. *See generally* Kurt Schelle and Ben Muse, Buyback of Fishing Rights in the U.S. and Canada: Implications for Alaska, Presented at the 114th Annual Meeting of the American Fisheries Society, in Ithaca, New York 11-14 (Aug. 15, 1984) (on file with the Nova Law Review) (explaining that the cost of running an appraisal-based vessel buy-back program results in a drain on the funds available to buy back the boats).

116. ECONOMIC ASSISTANCE AND RETRAINING NEEDS, *supra* note 37, vol. I at 39, 42.

administrative and court proceedings would in turn reduce the amount that can be paid to the fishermen. Unfortunately, the nonnegotiable price could negatively impact those with newer, more expensive nets since they may not receive compensation commensurate to their capital expenditures for the equipment. In contrast, fishermen with older, less expensive nets may get more than their nets are worth. The important thing is that there be a way for these fishermen to get back some of the money that they have invested in an industry that no longer exists.

As an additional control on financial resources, only certain types of nets can be sold to the state under this buy-back program.[117] The constitutional amendment bans the use of gill nets and other entangling nets, and limits other nets to certain sizes, but it does not ban all types of nets.[118] For example, hand-thrown cast nets can still be used and non-gill nets under 500 square feet of mesh area are acceptable.[119] If the nets were in good working condition on June 30, 1995 and are now illegal, then they are eligible for sale.[120] Thus, the plan requires that the nets be useable but for the ban created by the constitutional amendment.[121] Without such restraints, it is likely the limited funds would be more quickly depleted. Consequently, some fishermen would probably not receive any compensation. Deep water and shallow water gill nets, trammel nets, beach, purse, and seine nets, and shrimp trawls which exceed the 500-square-foot limit are included in the program.[122]

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117. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2663 (to be codified at FLA. STAT. § 370.0805(5)(a)1.-5.).

118. *See* FLA. CONST. art. X, § 16.

119. *Id.* § 16(a)(2), (c)(1).

120. Ch. 95-414, § 1, 1995 Fla. Sess. Law. Serv. at 2663 (to be codified at FLA. STAT. § 370.0805(5)(b)).

121. *Id.*

122. *Id.* § 1, 1995 Fla. Sess. Law Serv. at 2663-64 (to be codified at FLA. STAT. § 370.0805(5)(a)1.-5.). The legislature appears to have adopted some of the recommendations of the DLES, provided in *Economic Assistance and Retraining Needs Resulting from the November 8, 1994 Passage of Constitutional Amendment 3*, regarding the pricing of the nets eligible for buy-back. ECONOMIC ASSISTANCE AND RETRAINING NEEDS, *supra* note 37, vol. I at 43. The department's "high value" recommendations of $1000 for deepwater gillnets and trammel nets of at least 600 yards in length were chosen, while the department's "low value" recommendation of $500 for shallow water gill nets greater than 600 yards in length was approved. *Id.*; ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. 2660, 2663 (West) (to be codified at FLA. STAT. § 370.0805(5)(a)1.-3.). All types of seines were attached a value of $3500. *Id.* (to be codified at FLA. STAT. § 370.0805(5)(a)4.). The legislative history does not indicate why the department's high value recommendation of $750 for all types of seines was disregarded in favor of the $3500 price tag. *Id.*; Com. Comm. HB 1317 Staff Analysis,

Up to twenty million dollars will be available to buy back the nets of eligible fishermen. This money is to come from transfers of both "[s]tate funds that were appropriated to match federally funded programs but have not been expended as of June 30, 1995"[123] and "[u]nobligated and unappropriated trust fund balances of the DLES," so long as the transfer of the latter funds does not jeopardize agency operations.[124] The Executive Office of the Governor is to place these funds into a Seafood Workers Economic Assistance Account within the Special Employment Security Administration Trust Fund.[125] Interestingly, the statute states that funds that have not been spent at the end of fiscal year 1995-1996 are to remain in the account for use by the program in subsequent years.[126] This statement is illogical in light of the fact that the program has a cut off date of December 31, 1995. Assuming that there is money left in the account at that time, further legislation would be necessary to extend the program.[127]

IV. WHERE DO I GO TO GET COMPENSATION?

Fishermen who are interested in applying for either lost income assistance or selling their nets must do so at one of the twenty-three "one stop centers" located throughout the state.[128] The DLES has set up stations in various coastal communities around the state to counsel those eligible for unemployment compensation as to the various options relating to their elective coverage, that is, whether to elect coverage for 1994 or

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supra note 89; ECONOMIC ASSISTANCE AND RETRAINING NEEDS, *supra* note 37, vol. I at 43. Shrimp trawls of at least 500 square feet are worth $500 a piece. Ch. 95-414, § 1, 1995 Fla. Sess. Law Serv. at 2663 (to be codified at FLA. STAT. § 370.0805(5)(a)5.). Any gill net, trammel net, or seine which is less than 600 yards in length is valued proportionately. *Id.* § 1 (to be codified at FLA. STAT. 370.0805(5)(a)).

A fisherman who is selling back his nets must include the float line, webbing, and leadline that go along with the net being sold back, which must be cleaned and removed of its weights. *Id.* (to be codified at FLA. STAT. § 370.0805(5)(b)1.-2.).

123. Ch. 95-414, § 3(1), 1995 Fla. Sess. Law Serv. at 2664.

124. *Id.* § 3(2).

125. *Id.* § 3.

126. *Id.* § 4(2).

127. If extending the program is deemed undesirable or unnecessary, one possible use of the remaining funds would be to give economic support to those indirectly affected by the net ban, i.e., the wholesale and retail saltwater dealers.

128. NET FISHING FACTS, *supra* note 33, at 1, 3-4. Centers are located in Pensacola, Niceville, Panama City, Apalachicola, Crawfordville, Cross City, Crystal River, Hudson, Pinellas Park, Brandon, Bradenton, Englewood, Cape Coral, Naples, Mayport, Oakhill, Cocoa, Ft. Pierce, Riviera Beach, Ft. Lauderdale, Miami, Marathon, and Key West. *Id.* at 3.

1995, or both.[129] The two people assigned to each center will have access to the trip ticket information needed to compute the amount of weekly benefits due to the claimant, and the DLES is requesting that fishermen bring with them any other documentation of their earnings for the relevant base period.[130] Tax return information, such as an IRS Form 1099, is an invaluable source for verifying the income of a fisherman for 1994.[131]

The net buy-back program encompasses a two stage process.[132] First, the fisherman must fill out an application with the department at any of the one stop centers, designating the number of applications he would like to sell to the state.[133] The fisherman is then notified as to how many nets he is eligible to sell, and is given a time and place to return his nets.[134] Upon surrender of the nets, a receipt is issued and a check is sent via mail to the fisherman.[135] As of August 21, 1995, 840 miles of nets had been collected by the DLES at the various one stop centers throughout the state, a distance stretching from Florida to Chicago.[136] On August 25, 1995, 2874 nets had been purchased by the DLES at a cost of $4,865,258.96.[137]

V. CONCLUSION

It was important that the Florida Legislature take affirmative action to compensate the net fishermen. Although they may represent a small segment of the state population, they have been displaced from their jobs as a result of a choice made by the general population of the state. These fishermen have survived poor fishing seasons in the past, but this net ban effectively leaves them unemployed. The law does allow them to continue to fish using other means, but they have lost one of the most efficient and effective ways of doing their jobs. The law does not require that these fishermen be compensated for their loss, but notions of ethics and social policy demand that a group such as this be given financial assistance to help them make the transition into new trades. The legislature has taken important steps to assist the fishermen in getting back on their feet. The use

129. *Id.* at 1.
130. *Id.*
131. *Id.*
132. NET FISHING FACTS, *supra* note 33, at 2.
133. *Id.*
134. *Id.*
135. *Id.*
136. Interview with Ken Baer, *supra* note 27.
137. Telephone Interview with Andrea Turner, Fla. Dep't Labor & Employ. Sec., Office of Communication (Aug. 25, 1995).

of retroactive elective unemployment coverage, which does not exist anywhere else in the United States, allows those who have no source of income to receive benefits that will enable them to support themselves and their families. Those qualifying for partial benefits will be able to supplement their incomes until they find replacement employment. The net buy-back program allows fishermen to mitigate their capital losses related to running their fishing businesses.

Although the constitutional amendment is being challenged in the state courts, it is important that eligible fishermen apply for the available assistance while funding is available. Even if the fishermen are successful in their lawsuit, it may be months or years before the final decision regarding the net ban has been reached. The economic assistance is available for only a short time and is limited in its funding. If the lawsuit proves to be unsuccessful, the fishermen will be left with nets that are worthless and useless much like the fishermen in Texas who were given no compensation when that state banned gill netting in Texas waters. It is unfortunate that the net fishermen have lost their jobs, but it would be foolish to let the resources available go to waste. No doubt more may need to be done in the future to help these fishermen, but economic assistance is presently available to help begin the recovery process.

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